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ADVERTISING AND A DEMOCRATIC PRESS

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TABLE OF CONTENTS

I. ADVERTISING'S FINANCIAL SUPPORT FOR A DEMOCRATIC PRESS	2103
A. <i>Advertising as a Subsidy</i>	2103
B. <i>Hypothetical: Advertising as a Destructive Force</i>	2107
C. <i>Historical Change and Related Observations</i>	2112
D. <i>Is Advertising "A" Cause of the Decline in Competition?</i>	2119
E. <i>The Significance of Newspaper Competition</i>	2132
1. Does Competition Matter?	2132
2. Consequences for Politicians	2135

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II. ADVERTISING AND THE CONTENT OF A DEMOCRATIC PRESS	2139
A. <i>Avoiding Offense to Advertisers: A Kept-Press</i>	2144
B. <i>A Buying Mood: The Proper Surroundings for Ads</i>	2153
C. <i>The Need to Avoid Offending Anyone</i>	2156
D. <i>Content Tailored for the "Right" Audience</i>	2164
III. ECONOMIC ANALYSIS OF ADVERTISING'S EFFECT ON THE MEDIA	2168
A. <i>Market Failures</i>	2169
1. <i>The Decline of Competition</i>	2169
2. <i>Advertisers' Distortion of Content</i>	2172
B. <i>Inappropriateness of the Efficiency Standard</i>	2175
IV. POLICY PROPOSALS	2178
A. <i>Tax-Advertising/Subsidize-Readers (TA-SR) Proposal</i> . .	2180
B. <i>Alternative Tax and Subsidy Proposals</i>	2188
1. <i>The Kaldor Proposal</i>	2188
2. <i>Progressive Tax on Advertising</i>	2190
3. <i>The Swedish Plan</i>	2193
4. <i>Proposed Revenue-Oriented Media Taxes</i>	2197
C. <i>Combating Advertisers' Censorship</i>	2200
D. <i>Tax on Advertising in Commercial Video and Broadcasting to Fund Noncommercial TV and Radio</i>	2213
E. <i>A New State Communications Environment</i>	2218
V. THE CONSTITUTIONALITY OF TAXATION OR REGULATION OF ADVERTISING	2220
A. <i>A Broad or Narrow Reading of the Press Clause</i>	2221
B. <i>Protected Commercial Speech?</i>	2232
C. <i>Application of Constitutional Principles</i>	2233
CONCLUSION	2240

ADVERTISING AND A DEMOCRATIC PRESS

The First Amendment, adopted in the wake of the colonists' resistance to the British Stamp Act,¹ protects the press from "abridgement" of its freedom by government. The thesis of this Article, however, is that despite the potential danger and occasional occurrence of governmental censorship, private entities in general² and advertisers in particular constitute the most consistent and the most pernicious "censors" of media content. Organized private power is today the most serious threat to a free and democratic press. Consequently, existing structures and behavior of private power centers prevent the media from adequately serving the needs of a democratic society. Thus, although advertising can be viewed as the life blood of free media, paying most of the costs and thus making the media widely available, this Article examines advertising as a threat to a free and democratic press.

Once advertising is seen as a powerful censor and task master that systematically undermines a free and democratic press, a host of questions arise. Which of advertisers' relations with the media are objectionable? Do they violate existing laws? Are new regulations desirable? Constitutional? Would a tax on advertising in the mass media be desirable, for example, as a means to reduce the influence of advertisers over media content? Constitutional? Might answers depend on how broadly the tax is applied? Or on the use of the resulting tax revenue?

The Stamp Act was not the last tax on newspaper advertising. For good or bad reasons, advertising taxes are often proposed. During the Civil War, Congress raised revenue by taxing newspaper advertising.³ Florida recently adopted a tax on various services including advertising, but underestimated the power of the advertising lobby, which quickly forced repeal.⁴ The Bush adminis-

¹ Despite the historical importance attributed to the Stamp Act, which heavily taxed newspaper advertisements as well as newspapers, by the Supreme Court in *Grosjean v. American Press Co.*, 297 U.S. 233, 245-49 (1936), the British and Massachusetts' stamp acts' relevance to the First Amendment may be somewhat more complex. See *infra* note 452.

² In a future article I intend to look at threats to press freedom resulting from the form and concentration of ownership.

³ See Act of July 1, 1862, ch. 119, § 88, 12 Stat. 432, 472-3; FRANK L. MOTT, *AMERICAN JOURNALISM: A HISTORY, 1690-1960*, at 398 (1962).

⁴ See An Act Relating to Taxation, 1987 Fla. Laws ch. 6 (repealed 1987); Steven

tration proposed, but quickly abandoned, a plan to limit the deductibility of advertising expenses.⁵ Academics have proposed a progressive tax on newspaper advertising as preferable to the Newspaper Preservation Act's "joint operating agreements" as a means of promoting newspaper competition.⁶ Many states are currently considering extending existing taxes to either newspaper sales or newspaper advertising.⁷ Likewise, our history provides many examples of regulation of advertising—regulations that were constitutionally unquestionable as long as the commercial speech was not protected by the First Amendment.⁸

Powerful policy arguments against such taxes, as well as other government regulations of advertising, emphasize that advertising pays the largest part of the bill for our "free press."⁹ By "subsidizing" the press, advertising makes mass media broadly available. This subsidy enables the media to engage in the expensive enterprises of gathering, shaping, and distributing news (and entertainment). Advertising is so important to the press that Germany, which views only the print media and not broadcasting as the "real" press, gives

M. Cohen, Note, *A Tax on Advertising: First Amendment and Commerce Clause Implications*, 63 N.Y.U. L. REV. 810, 810 (1988) (discussing the Florida law).

⁵ See Steven W. Colford & Julie Liesse, *Marketers Dodge Bush Tax Bullet*, ADVERTISING AGE, Oct. 29, 1990, at 1.

⁶ See Richard J. Barber, *Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy*, 24 LA. L. REV. 503, 553 (1964) (examining the impact of antitrust policy on the newspaper industry, and suggesting that in view of its limitations, "progressive tax levies on advertising revenue" would be more effective in reducing reliance on advertising as a source of revenue); Thomas E. Humphrey, Comment, *The Newspaper Preservation Act: An Ineffective Step in the Right Direction*, 12 B.C. INDUS. & COMM. L. REV. 937, 951-54 (1971) (noting that the Newspaper Preservation Act will slow down, but not stop, the anticompetitive trend, and proposing a progressive tax on newspaper advertising revenue).

⁷ See *infra* text accompanying notes 327-43.

⁸ See *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Given the Supreme Court's recent commercial speech decisions, particularly *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), this may again be relatively unproblematic.

⁹ Advertising provides this country's daily newspapers with 60% to 80% of their revenue, see *infra* note 18, and broadcasters with virtually all of theirs.

The extent to which newspapers depend on advertising revenues varies quite dramatically from country to country. In the mid 1970s, the percentage of newspaper revenues that came from advertising was approximately 83% in Switzerland, 71% in West Germany, 50% in Sweden, 41% in Great Britain, and 33% in France. See ROYAL COMM'N ON THE PRESS, FINAL REPORT APPENDICES app. C at 105-06 (1977) [hereinafter ROYAL COMMISSION] (listing press subsidies in foreign countries). Percentages may give an inadequate feel for the differences. Receiving 83% means that the typical newspaper receives 4.9 times as much revenue from advertisers as from readers, while receiving 33% means that readers provide twice the revenue of advertisers.

constitutional protection to the print media's reliance on advertising.¹⁰

Still, could it also be that advertising undermines a free press? Defenders of advertising's present role usually grant that, like most social practices, advertising has negative as well as positive aspects. Advertising itself often provides useful information to consumers and promotes purchasing behavior that may stimulate the economy. It also, however, often distorts facts, promotes contested consumerist values and contested visions of social life, of women, of men, and of our needs and their solutions.¹¹ Neither the form nor content of advertising's messages have unambiguously desirable consequences for social life. Nevertheless, in this article I want mostly to put aside issues concerning the good or bad of advertising's own content. If there are negative effects, presumably the government should deal with them, if at all, with regulations directed at the specific objectionable contents.¹² I suspect that a broad consensus

¹⁰ The German Constitutional Court suggests that legislative bodies have a constitutional obligation to prevent broadcastings' access to advertising from inordinately undermining newspaper's advertising. See *North-Rhine/Westphalia Broadcasting Law*, 82 BVerfGE 238, 1991 NJW 899, 907 (holding that the purpose of the broadcasting statute of North-Rhine/Westphalia—the protection of the economic basis of the press against dangers resulting from commercial broadcasting—supports the constitutionality of the law); *Lower Saxony Broadcasting Law*, 73 BVerfGE 118, 180 (1986) (F.R.G.) (noting that the danger that advertising on private broadcasting will result in the press losing an essential source of financing is relevant under constitutional law, since that would affect the constitutional protection of the press as an institution, that is, the existence and effectiveness of a free press); *FRAG*, 57 BVerfGE 295, 341 (1981) (F.R.G.) (raising but not deciding whether financing of private broadcasting needs regulation in order to protect the press).

¹¹ Given that two of the greatest causes of premature death and of loss of work are tobacco and alcohol, advertising can hardly be treated as having an unambiguously positive effect on society once it is noted that "[i]n 1979, tobacco and liquor companies were [magazines'] two largest advertisers." Robert J. Samuelson, *The End of Advertising?*, NEWSWEEK, Aug. 19, 1991, at 40.

Elsewhere I have argued that excluding commercial speech from constitutional protection is justified either because the advertising of the market-oriented enterprise is an integral part of an instrumentalist exercise of power by participants in market exchange or because the dictates of the market rather than human choice determine the message content of advertisements. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194-224 (1989). Since this Article's concern is not advertising content, these claims are largely irrelevant here.

¹² This response may not be adequate if the objectionable aspects are pervasive in advertising, for example, if the objection is to the role of advertising content as a whole in creating an impoverished culture. See MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION* 209-38 (1984) (describing advertising as "capitalist realism," an art form or symbolic culture that shapes our values, flattens experience, simplifies, portrays satisfactions as inevitably private, and glorifies private life and material

assumes that any other, more systemic, negative effects of advertising should be accepted because these effects will be vastly outweighed by the overwhelming benefit of making mass media widely available.

The primary purpose of this essay is to evaluate this assumption: that on balance the existing contributions of advertising to the mass media are positive and that broad regulatory restrictions or tax burdens would be undesirable. Parts I and II will consider the effect of advertising on media's non-advertising content and on the distribution of media content. Part III will consider the insights that an economic efficiency analysis sheds on the observations of Part I and II. These first three sections find serious problems with the current advertising-based system. Thus, Part IV begins the necessary task of designing proposals that respond to these problems. Since any legislation dealing with the press immediately raises First Amendment questions, Part V considers the constitutionality of the proposals described in Part IV.

Of course, to criticize effects of advertising on the press implies some image of proper press performance. My evaluative standpoint will be that of creating or maintaining a democratic, free press. The focus is on the role of the press in serving democracy. This standpoint reflects what I assume is a central element of the constitutional justification for extending protection to the press as an institution rather than merely protecting the press as an element of the individual's autonomy right of self-expression. Of course, this justification for protection is instrumental—the value and significance of institutions lie in how they serve human values and interests.¹³ Here the policy concern is: what type of press, what type of mass media, will adequately serve a free and democratic society?

Obviously, this evaluative perspective will be influenced by the conception of democracy adopted. An elitist conception may require most centrally a press that performs the "checking function," capable of exposing abuse of power.¹⁴ A more robust

ambition). Moreover, even granted this Article's critique of the effect of advertising on non-advertising media content, decisions to regulate could depend on an assessment of the merits of the advertising content that would inevitably be affected by the regulation.

¹³ See BAKER, *supra* note 11, at 229-34, 250-55.

¹⁴ See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (analyzing "the sources and premises of the idea that free expression has value . . . in checking the abuse of official power").

conception of "participatory" democracy would require additional press functions, possibly suggested by the slogan: "the public's right to know."¹⁵ Depending on whether the more broad-based conception of democracy emphasized a republican common dialogue or, alternatively, the diversity of groups each with their own concerns, the nature of optimal press segmentation would vary.

The necessary specificity of the description of either democracy or the corresponding conception of an ideal press depends on the evaluative issues at stake. For purposes of this Article's claims that advertising undermines a democratic press, I implicitly assume only that democracy involves the possibility of broad-based popular participation of people with diverse inclinations. Therefore, I use "democratic" (or "free and democratic") to modify press in order to emphasize two dimensions of output: (a) availability—a press is more democratic the more its products are widely available; (b) content—the content of a democratic press should serve the diverse *desires* or, somewhat more controversially, the diverse *needs* of the various elements of the democratic society. The "democratic" aspect of the press relates both to circulation and to provision of "uncensored" information and opinion that readers desire or need. A democratic press should be both responsive and pluralistic in its communications.¹⁶

I. ADVERTISING'S FINANCIAL SUPPORT FOR A DEMOCRATIC PRESS

A. *Advertising as a Subsidy*

Advertising in the media confers obvious benefits. First, but beyond the scope of this paper, are benefits to the enterprises that advertise, to the buying public that relies on advertising for information about transaction opportunities, and to the economy as a whole due to advertising's stimulus to economic activity. Often, readers and viewers are as interested in the ads as in the media's non-advertising or "editorial" content.¹⁷ Of course, rather than

¹⁵ See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965).

¹⁶ Of course, many additional specific qualities could be listed as appropriate elements of a free and democratic press. See, e.g., Michael Gurevitch & Jay G. Blumler, *Political Communications Systems and Democratic Values*, in *DEMOCRACY AND THE MASS MEDIA* 269, 270 (Judith Lichtenberg ed., 1990) (listing eight non-exclusive functions or goals of a democratic media).

¹⁷ Throughout this article "editorial content" refers to all the media's non-advertising content. This terminology is common within journalism although it

providing these benefits, advertising sometimes imparts misinformation that is injurious both to the public and the economy. Moreover, normative assessments of our consumer society and of advertising's role in creating and maintaining it are contested. I put these issues aside.

Second, the newspaper industry obtains 60 to 80% of its revenues from advertising.¹⁸ Advertising pays a large portion of the costs of supplying the public with newspapers.¹⁹ For a democratic press this advertising "subsidy" may be crucial.²⁰ Without

diverges from a popular usage of "editorial" as referring to statements of opinion as distinguished from presentation of "facts," news, or entertainment.

¹⁸ Estimates vary. See, e.g., BEN BAGDIKIAN, *THE MEDIA MONOPOLY* 115 (3d ed. 1990) (stating that 75% of daily paper revenues were from advertising, including classified advertising); PETER J.S. DUNNETT, *THE WORLD NEWSPAPER INDUSTRY* 25 (1988) (as much as 80% of revenue of the Wall Street Journal comes from ads); JAMES N. ROSSE & JAMES N. DERTOUZOS, *ECONOMIC ISSUES IN MASS COMMUNICATIONS INDUSTRIES* 29 (1978) (finding that daily papers get 60 to 80% of revenues from advertising, including classified advertising); *id.* at 44 (stating that representative paper in 1977 obtained 76% of revenue from advertising); JON G. UDELL, *THE ECONOMICS OF THE AMERICAN NEWSPAPER* 99 (1978) (placing advertising revenue figure at 65% to 70%); 2 *WORLD PRESS ENCYCLOPEDIA* 975 (George T. Kurian ed., 1982) (stating that dailies received between 20% and 30% of revenue from circulation sales).

¹⁹ One economic study estimates that without advertisements newspapers would cost as much as five times their current price and concludes that "[a] full cost-to-the-reader general newspaper free of advertisements would not be commercially viable." DUNNETT, *supra* note 18, at 39 n.7.

²⁰ Although advertising provides revenue, it also imposes costs—for ink, newsprint, obtaining ads, composing, distribution (due to added bulk and weight of paper), etc. Conceivably, most of the advertising revenue could be expended on providing the ads and thus provide little subsidy to other aspects of the newspaper's operations. Theoretically, since advertisers value readers and readers often value ads (as well as editorial content) and the paper sells to both, the direction of subsidy might be expected to reflect which party values the other the most—whether advertisers value readers or readers value advertisements more. I hazard the guess that this might be historically variable—e.g., in the eighteenth century the availability of goods for sale might be especially valuable news to the reader, while today mass marketers and competitive sellers most likely value the reader more than vice versa.

One statistical study offers apparent support for the view that advertising contributes only a relatively small subsidy to newspapers' non-advertising costs. See Lawrence C. Solely, *Does Advertising Lower the Prices of Newspapers to Consumers?*, 66 *JOURNALISM Q.* 801, 806 (1989). This study requires careful examination since, if true, it would mean that there is no need to preserve advertising in order to protect the press' viability; moreover, for purposes of this article, its most important implication is that advertisers might not be expected to exercise much leverage over media content.

Basing his analysis on statistical comparisons of papers, the crucial element of Solely's interpretation of his data lies in his assumption that, for a given circulation, advertising space corresponds to advertising revenue such that as advertising space increases, advertising revenue proportionately increases; and, likewise, that as

advertising, the resources available for expenditures on the "news" would decline, predictably leading to an erosion of quality and quantity. The cost of the "news" to the public would increase, thereby restricting its "democratic" availability.

This assessment of advertising may seem uncontroversial—the implication of simple economic logic. Both advertisers and readers are willing to pay for and both benefit from the same product, a newspaper combining editorial content with advertising, getting into the hands of the reader. The reader, who may be either relatively indifferent to or desirous of advertising, is willing to pay some amount for the newspaper. In contrast, the advertiser's goal is for the reader to read the advertising content. Therefore, in addition

editorial space increases, editorial expenditures proportionately increase.

This analysis is fundamentally flawed. See C. Edwin Baker, Comment on Solely's "Does Advertising Lower the Prices of Newspapers to Consumers" (unpublished manuscript, on file with author). First, to the extent papers spend (some of) their increased ad revenue to improve quality rather than increase quantity of editorial content, Solely's study underestimates how much advertising subsidizes editorial content. Moreover, quality expenditures seem likely if for no other reason than to gain an increasingly "upscale" readership for which the paper could charge advertisers a higher price. Second, to the extent that papers with a high demand for ad-space respond in part by increasing their price for ad-space, which is the economically predictable response, Solely's focus on ad-space predictably underestimates advertising's subsidy contribution. Third, to the extent that papers with low demand for ad-space lower their price for ads in order to increase their advertising up to some acceptable level, the effect on the statistical analysis is the same. As noted, it causes an underestimation of advertising's contribution. Fourth, the study underestimates ads' contribution if papers with larger proportionate ad revenue take more revenue out as profit, as seems likely. Fifth, if actual papers engage in partial price discrimination in selling ads, as seems likely, then the marginal ads, which are the ones whose effect the study purported observes, will be the least potent in providing a subsidy, thus leading the study to underestimate advertising's subsidy contribution. (Solely also curiously included editorial space as an element of both his dependent and one of his independent variables, which undermines confidence in the analysis' interpretation of relative contributions of the two independent variables.)

In other words, Solely's analysis collapses once a uniform relation between advertising space and ad revenue, or between editorial space and editorial expenditures, is rejected. This misguided assumption provided the prism through which Solely was able to read Reddaway's classic study of London newspaper's finance as evidence supporting "the theory that advertising does not 'subsidize' the editorial product," noting that the higher priced London papers had the most advertising. Solely, *supra*, at 802-03. However, Reddaway, relying on actual data of advertising and circulation revenue and expenditures, found that these higher priced papers received a 5 d. subsidy (i.e. revenue in addition to revenue to cover the cost to the paper of including the advertising) per copy from advertisers compared to 4 d. revenue from sales—that is, readers paid for none of the costs of advertising and only about 44% of the cost of editorial content, the rest coming from advertisers. See William B. Reddaway, *The Economics of Newspapers*, 73 ECON. J. 201, 206 (1963).

to paying the costs of advertising content, the advertiser is willing to pay part of the cost for editorial content to obtain readers for the medium containing the ads. The advertiser will even pay extra for more expensive, "high quality" editorial content if it attracts a particularly desirable readership.²¹ Having established that both purchasers are willing to pay for editorial content,²² surely not collecting from one of two potential "joint" purchasers of a product would cause the seller to receive less for the product. Any blockage of sales to the advertiser would produce an inefficient contraction of the supply of editorial content. Without advertising (or with reduced advertising) there would be less revenue to pay for the media; hence, less media production.

If advertising revenues were eliminated, a publisher might attempt to recoup part of the lost revenue by charging a higher price, but this higher price will cause a loss of marginal readers²³ and result in a smaller amount of total revenue than it previously received from readers combined with advertisers.²⁴ The result of eliminating (or, more plausibly, reducing) advertising apparently must be some combination of an increase in price, a decrease in readership, and a decrease in the amount spent on news production—a net deterioration of the democratic press.

Despite its disarming simplicity, I will argue that the above analysis is wrong. To begin developing this critique, I present a hypothetical scenario in which the above simple economic logic does not pan out. I then suggest that the assumptions on which the hypothetical is constructed have considerable historical basis, thus weakening the affirmative case for advertising's contribution to the

²¹ For example, in 1960 advertisers provided 48% of the revenue for typical London "popular" dailies but 73% of the revenue for typical London "quality" dailies. See Reddaway, *supra* note 20, at 207. The advertising rate per copy sold in the "quality" was 3.9 times the rate for the "popular." See *id.*

²² The advertisers' willingness to pay for non-advertising content is the same in principle in newspapers and broadcasting; it is only more obvious in broadcasting. If readers valued advertising more than advertisers, the "subsidy" might work the other way—as it does in papers containing classified ads where the reader pays for the paper and the advertiser is permitted to advertise for free.

²³ More precisely, the newspaper will lose "marginal purchasers," which will not directly correspond to a loss in readers. Historically, as price goes up, the number of readers per copy tends to increase. See *infra* note 58.

²⁴ If, before the elimination of advertising, the paper could have charged readers a higher price and obtained from readers alone as much as it had obtained from readers plus advertisers, the profit maximizing paper would have charged something closer to that price and also obtained at least some of its previous advertising revenue.

media. My later discussion of other negative effects of advertising further support a pragmatic reconsideration of the contribution of advertising to a democratic, free press—a press that is widely available and responsive to the needs of a diverse society.

B. Hypothetical: Advertising as a Destructive Force

Imagine two periods, one before and one after advertising is introduced into the newspaper world. During "Time 1," there are two principal types of relevant costs: variable costs, like those for paper, ink, printing, and distribution; and first copy costs, which are primarily editorial or "news" expenses for gathering, writing, editing, and composing copy.²⁵ For a paper to be financially sound, revenue must cover both costs and presumably provide some profits. The break-even finances would be:

$$(1) \text{ Circ} \times \text{CP} = (\text{Circ} \times \text{AVC}) + \text{FCC}$$

where Circ = circulation; CP = cover price; AVC = average variable costs per copy; and FCC = first copy costs. This can be solved for FCC—the money available for editorial expenses. The revenue available to cover first copy costs equals circulation times the amount cover price exceeds average variable costs per copy:

$$(2) \text{ FCC} = (\text{Circ} \times \text{CP}) - (\text{Circ} \times \text{AVC}) = \text{Circ}(\text{CP} - \text{AVC})$$

Assume that at Time 1 there are three papers, each with devoted readers. Also assume that the average variable costs, such as, paper, ink, and distribution, vary from \$.17 to \$.20 per copy, being somewhat higher for the smaller circulation, up-scale papers. Thus, a possible situation is:

Time 1:

<i>paper</i>	<i>Circ</i>	<i>CP</i>	<i>Circ(CP - AVC) = available.ed.resources</i>
Pap. X	1500	.50	1500(.50 - .20) = \$450 for news
Pap. Y	2000	.40	2000(.40 - .18) = \$440 for news
Pap. Z	4500	.25	4000(.25 - .17) = \$320 for news

²⁵ There are also "fixed" or long term variable costs. Those that exist irrespective of the size of circulation should be depreciated and added to first copy cost; those that vary with circulation, should be depreciated and added to variable costs. Precise categorization can be ignored for present purposes.

At "Time 2," advertisers enter. Consider each of two possibilities. First, assume that advertisers as a group pay \$.12 per copy per reader of Paper Y beyond the actual costs of including the ads (the ink, paper, and composing needed to include the ads) but, for some reason, they advertise only in Paper Y. This exclusiveness could reflect a principled choice by Papers X and Z not to take advertising; or perhaps advertisers had no interest in using advertising to reach their readers; or, possibly, advertisers refused to place ads in these papers for ideological reasons. Although as a practical matter, a complete absence of advertising in these papers is unlikely, reduced advertising in particular papers, for reasons such as those mentioned above, does occur.²⁶ But assuming this advertiser focus on Paper Y, what would be the consequences?

No general answer can be given. Still, Paper Y will predictably be able to use its advertising revenue both to increase its editorial expenditures, producing a better paper, and to reduce its price. This change in Paper Y should attract readers from Papers X and Z, thereby further enriching Paper Y and allowing it to augment the changes described. The consequence for Papers X and Z could be severe. If they lose perhaps half their readers, this would reduce by at least half the revenue to cover their "first copy costs." This reduction in revenue will likely cause either the quality of their content to decline drastically or cause them to increase their cover price, leading to a spiral of further loss of readers and new declines in content. The virtually inevitable result is closure, either before or after bankruptcy. This abstract scenario illustrates the historical observation of Noam Chomsky and Ed Herman that "an advertising-based system will tend to drive out of existence or into marginality the media companies and types that depend on revenue from sales alone."²⁷

²⁶ Some magazines make a conscious decision not to take advertising and others have chosen to take it only a very limited basis. James Curran documents some ideological or political discrimination against the radical working-class press. See James Curran, *Capitalism and Control of the Press, 1800-1975*, in MASS COMMUNICATION AND SOCIETY 195, 218 (James Curran et al. eds., 1979). However, he finds much more widespread evidence of discrimination on the basis of the perceived value of the working-class audience, quoting, for example, an early, anonymous expert: "Character is more importance than number. A journal that circulates a thousand among the upper or middle classes is a better medium than would be one circulating a hundred thousand among the lower classes." *Id.* at 218-19 (quoting *Guide to Advertisers* (1851)).

²⁷ EDWARD HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* 14 (1988).

Alternatively, assume that advertisers are willing to purchase advertising in all three papers—valuing readers on average at \$.12 each (beyond the paper, ink and labor costs of the ad itself)—although distinctly more for elite readers of Paper X and less for the poorer readers of Paper Z. What would be the result? The competition could lead to a new equilibrium between the papers,²⁸ but not necessarily. If one paper is best able to use new advertising income to change its combination of format and selling price in a manner that draws readers from other papers, those other papers may enter the declining-circulation/declining-quality spiral which ends like the first scenario. This corresponds to the local monopoly daily newspapers that apparently constitute the equilibrium position in the United States today. Thus, it seems quite plausible that after advertising is introduced, a single paper would prevail. Does this equate to advertising subsidizing expenditures on news and making the press democratically available, as argued above? This question cannot be answered abstractly.

As a possible empirical scenario providing a possible answer, assume the single prevailing paper, Paper P (which may reflect a merger of Papers Y and Z, with Paper Z failing) is able to sell for \$.20 and still spend more for editorial content than did any of the previously existing papers. Suppose, however, that 20% of the readers of the original papers valued distinctive qualities of “their” papers so much that they will not bother to purchase Paper P, even though it is the only alternative and sells at the low price of \$.20. Still, not enough of these readers exist to keep their preferred paper alive. Meanwhile, Paper P will pick up most of the readers of the former papers plus some new readers who previously purchased no paper. Thus, assume Paper P reaches 4/5 of the 7500 readers from Time 1 plus 1000 new readers, for a total of 7000.

In order to include the ads, Paper P becomes larger, thereby increasing its variable costs, but advertisers pay those additional variable costs related to the advertising plus an additional \$.12 per reader. Therefore, below I will ignore the increase in average variable costs due to ads and the portion of ad revenue that pays for this increased cost. Paper P also gets larger because of new editorial items, resulting in some additional variable costs over those at Time 1. Thus, the new hypothetical situation is:

²⁸ In the few remaining American markets where competitive daily newspapers exist, maintenance of competition seems to depend on both papers maintaining roughly equal circulation.

Time 2: second scenario:

$$\begin{array}{llll} \text{paper} & \text{Circ} & \text{CP} & \text{Circ}(\text{CP} + \text{ads} - \text{V.C.}) = \text{available.ed.resources} \\ \text{Pap. P} & 7000 & .20 & 7000(.20 + .12 - .22) = \$450 \text{ for news} \end{array}$$

Note that this scenario assumes that *some* readers value a particular type of paper sufficiently that they are not satisfied by a different paper even at a lower cost. It also assumes that, although many readers will consider comparative price in deciding which of several papers to purchase, demand is sufficiently inelastic that a drop in price only marginally produces new purchasers.

The significance of this possible scenario should not be underestimated. Free market advocates often admit the troublesomeness of obvious inequalities of income, but they usually claim that in a market system, if people value a product enough to pay for it, the market will produce it.²⁹ The hypothetical illustrates that a news journal's survival depends in part on the preferences of other purchasers (advertisers) for other products (the readers of another newspaper). Readers could value a particular journal sufficiently that when sales to readers cover all journals' entire costs, the readers would support the particular journal's flourishing. The journal could fail, however, if advertisers "purchase" readers of other journals.

After quoting the conventional analysis given by a free market advocate, James Curran describes a situation that closely resembles the above hypothetical. The closing of the *Daily Herald*, "the lone consistent voice of social democracy in the national [British] daily press," occurred, in the words of Sir Denis Hamilton (the Chairman of Times Newspaper Ltd.), because "the *Herald* was beset by the problem which has dogged nearly every newspaper vowed to a political idea: not enough people wanted to read it."³⁰ But Sir Hamilton's explanation represents the victory of typical conservative ideology over facts. Curran notes that the *Daily Herald*, "on its death-bed, was read by 4.7 million people—nearly twice as many as

²⁹ I put aside the possibility of invidious or exploitative reasons why this assumption may not be true, such as the likelihood that powerful social groups will restrict (or impose additional costs) on production of goods that could undermine their position of power, or that monopolists will restrict production in order to increase profits. See generally RICHARD EDWARDS, *CONTESTED TERRAIN* (1979) (showing that work relations often reflect concerns for control as much as concerns for efficiency).

³⁰ Curran, *supra* note 26, at 225.

the readership of *The Times*, *Financial Times* and *Guardian* added together." Surveys showed that its readers "constituted the most committed and the most intensive readers, with the most favourable image of their paper, of any national paper audience in the country."³¹ The problem was not a lack of readers but that the *Daily Herald's* readers "were disproportionately poor working class and consequently did not constitute a valuable advertising market to reach."³²

Other features of the hypothetical merit attention. Although the introduction of advertising results in the surviving paper being both bigger and cheaper than any of the initial papers in the hypothetical, the total number of newspaper readers declined. The "consumer surplus"—the amount consumers value receiving the product beyond what they pay for it—cannot be abstractly calculated since it depends on actual demand, that is, actual preferences. Nevertheless, it is possible that the readers' consumer surplus was greater when there were three papers than when most switched to the new, cheaper paper and others stopped purchasing a newspaper altogether. Readers of the *Daily Herald* apparently valued their paper more than others valued theirs—suggesting a higher average consumer surplus for the more diversified, non-advertiser supported press.

Thus, this hypothetical illustrates that advertising, or the move from a world without advertising to a world with advertising, could have the following consequences:

- 1) a single surviving, usually "centrist," paper that costs consumers less and has more resources available for expenditures on editorial content than any paper had before the introduction of advertising;³³

³¹ *Id.*

³² *Id.*

³³ Competitive papers presumably must split both advertising and circulation available in a community. Thus predictably each would individually have much less money available to spend on editorial content than would a monopoly paper. Surprisingly, available evidence suggests that competition results in each paper allocating more money for editorial content than when and if one becomes a monopolist. See, e.g., Stephen Lacy, *The Effects of Intracity Competition on Daily Newspaper Content*, 64 JOURNALISM Q. 281 (1987). Lacy found that competition affected newspapers' budget allocations in the direction of purchasing more wire services and hiring more reporters to fill a given space. He concluded that "intense competition means a newspaper must spend more money to differentiate itself and to remain a substitute for its competitor." *Id.* at 288.

- 2) the elimination of competitive newspapers and a reduction in diversity of newspapers;
- 3) implicit in (2), the failure of papers that would exist, and that people would pay for, in the absence of advertising;
- 4) a decline in total readership;
- 5) a decline in consumer surplus produced by newspapers; and
- 6) a reduction in total resources spent on editorial content.³⁴

If the hypothetical scenario described the real world, it would not be clear whether Time 1 or 2 was preferable from a policy perspective. Such a judgment would require both additional information and controversial value judgments. Still, from the perspective of democratic theory, each of the consequences described in points two through six should count as a real loss.

C. *Historical Change and Related Observations*

Many historical observations conform to the broad outline of the hypothetical scenario. First, newspaper competition began to decline as the role and the extent of advertising in the print media increased during the late nineteenth and early twentieth century. In fact, some references leave the impression that advertising became a major ingredient of newspapers only around the beginning of the twentieth century, with the introduction of "mass advertising"—primarily by regional chains, often department stores, and by marketers of national products.³⁵ It is suggested that "[b]efore mass advertising, . . . papers succeeded solely because they pleased their readers."³⁶

However, advertising has long been with us. Even the names of typical early nineteenth century papers like *The Boston Daily Advertiser*, illustrate its importance. In the first quarter of the

³⁴ Of course, some of the expenditures by the different papers are surely duplicative, which might be considered wasteful.

³⁵ See, e.g., BAGDIKIAN, *supra* note 18, at 120-25 (referring to the rise of mass advertising as occurring during the last two generations).

³⁶ *Id.* at 125.

nineteenth century, papers were usually at least half advertising, with some mercantile papers devoting more than four-fifths of their space and political papers as much as three quarters of theirs to ads.³⁷ As early as 1803 Alexander Hamilton could claim that “[i]t is the advertiser who provides the paper for the subscriber.”³⁸ The typical paper in 1826 was four pages with the first and fourth page filled almost exclusively with advertising.³⁹ The mass circulation penny press, which Michael Schudson argues “invented” the category “news,” were introduced in the 1830s in competition with the established six penny papers.⁴⁰ According to Schudson, these papers relied even more on advertising, particularly of patent medicines, which purported to cure virtually every malady medical science had yet identified.⁴¹

Despite the pervasive presence of advertising since at least the middle of the eighteenth century, for purposes of understanding the economics of newspapers, the more relevant concern is advertising's contribution to newspaper revenues. A Congressional opponent of a tax on advertising, adopted to help pay the expenses of the Civil War, asserted that “every member is aware that it is the advertisements and not the circulation of a paper that is profitable.”⁴² Nevertheless, much of the early advertising may have barely paid for itself. From both the readers' and the newspapers' perspective this could make sense. If most advertising merely provided specific information desired by readers, much like classified advertising does today, a newspaper could consider the advertising part of its news and be happy that the advertiser paid anything for its inclusion.

The meager data available roughly fits this description. First, early in the nineteenth century, advertising rates were reportedly

³⁷ See MOTT, *supra* note 3, at 201. Mott reports that although there were few advertisements in the first, unprosperous papers in the country, “announcements of merchants and traders” filled three to five pages of papers by the middle of the eighteenth century. *Id.* at 56.

³⁸ Robert Atwan, *Newspapers and the Foundations of Modern Advertising*, in THE COMMERCIAL CONNECTION 9, 14 (John W. Wright ed., 1979).

³⁹ See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN PAPERS* 14 (1978).

⁴⁰ See *id.* at 22.

⁴¹ See *id.* at 18-19 (noting that “[s]ources of income that depended on social ties or political fellow feeling were replaced by market-based income from advertising and sales” and that “[p]atent medicines became the mainstay of the advertising columns”); see also MOTT, *supra* note 3, at 298 (noting that “[f]ront pages were more or less filled with advertising until the fifties”).

⁴² CONG. GLOBE, 37th Cong., 1st Sess. 1487 (1860) (statement of Representative Colfax).

quite low.⁴³ Not until the 1870s did display advertising become common.⁴⁴ Schudson suggests that most newspapers were somewhat hostile to advertising until the 1880s. Then department stores and marketers of brand name or trademarked national products began seeking large quantities of advertising space, and "[t]he ratio of editorial matter to advertising . . . changed from about 70-30 to 50-50 or lower."⁴⁵ According to Dan Schiller, "in the mid-nineteenth century relatively unorganized advertising by relatively small companies did not exert decisive control over newspaper content, [but] by the turn of the twentieth century both the size and the increased expenditures of advertisers changed this."⁴⁶ Thus, it is no surprise that the proportion of newspaper revenue derived from advertising rose steadily for the fifty years after 1879. One early study, relying on census data, reports that the percentage of newspaper and periodical revenue from advertising increased at a rate of about 5% per decade over a fifty year period:⁴⁷

1879	44.0%
1889	49.6
1899	54.5
1909	60.0
1919	65.5
1929	70.9

Certainly the data suggest that the role and contribution of advertising may have been changing during the late nineteenth and early twentieth centuries.

Second, with only a slight lag (during which the competitive implications of the increase in advertising developed), this century's

⁴³ See, e.g., MOTT, *supra* note 3, at 201 (noting the especially high ratio of advertising to space due to low rates).

⁴⁴ See *id.* at 504.

⁴⁵ SCHUDSON, *supra* note 39, at 93 (citation omitted).

⁴⁶ DAN SCHILLER, OBJECTIVITY AND THE NEWS 185 (1981) (citation omitted).

⁴⁷ ALFRED M. LEE, THE DAILY NEWSPAPER IN AMERICA 748-49 (1937). This increase of roughly 5% a decade from 1879 to 1929, combines newspapers and other periodicals; after 1909, Lee also listed percentages for newspapers, which tended to be 1% to 4% higher than for the combination, reaching a high of 74.3% of newspaper revenue in 1929. See *id.* Lee's data was relied upon, but mistranscribed, in SIDNEY KOBRE, THE YELLOW PRESS AND GILDED AGE JOURNALISM 309 (1964). Schudson reported that the portion of newspaper revenue from advertising increased from 44% in 1880, to 55% in 1900. See SCHUDSON, *supra* note 39, at 93. Elsewhere, Schudson also cites a different study that found advertising revenue as a percent of newspaper revenue rose from 49% in 1879 to 64% in 1909. See *id.* at 206 n.13.

long and dramatic decline in local newspaper competition followed this increased reliance of newspapers on advertising revenue. Despite the country's increasing population, the total number of daily newspapers has declined from 2202 in 1910 to 1657 in 1986, although remaining relatively constant since 1943.⁴⁸ Much more dramatic has been the decline in competition. This decline has been continuous, with the number of competitive dailies declining in each decade since at least 1910.⁴⁹ Defining as competitive only those towns with separately owned and operated papers, the number of cities with competitive dailies were:⁵⁰

1910 - 689
 1920 - 552
 1930 - 288
 1940 - 181
 1960 - 61
 1978 - 35
 1986 - 28

The decline in the *percentage* of newspapers competing against another daily in the same city began even earlier; although the number of competitive dailies proliferated between 1880 and 1910, non-competitive dailies increased even more quickly. Thus, the percentage of dailies facing competition was.⁵¹

⁴⁸ See ROSSE & DERTOUZOS, *supra* note 18, at 48 (citing James N. Rosse et al., *Trends in the Daily Newspaper Industry 1923-1973*, in 1978 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK); John C. Busterna, *Trends in Daily Newspaper Ownership*, 65 JOURNALISM Q. 831, 833 (1988); Raymond B. Nixon & Jean Ward, *Trends in Newspaper Ownership and Inter-Media Competition*, 38 JOURNALISM Q. 3, 5 (1961).

Different studies report slightly different numbers. Possibly the most cited figures are from the Rosse study, which reports a decline in dailies from 1589 in 1923 to 1589 in 1978. Busterna reports a decline from 2042 in 1920 to 1657 in 1986. See Busterna, *supra*, at 833. Nixon and Ward report 850 dailies in 1880; 2202 in 1910; 2042 in 1920; 1744 in 1945; and 1763 in 1960. See Nixon & Ward, *supra*, at 5. Apparently the number of dailies peaked around 1910.

⁴⁹ One study indicates, although without supporting data, that this trend has been observable since 1890. See Paul Neurath, *One-Publisher Communities: Factors Influencing Trend*, 21 JOURNALISM Q. 230, 240 (1944).

⁵⁰ See ROSSE & DERTOUZOS, *supra* note 18, at 56 (figures for 1978); Busterna, *supra* note 48, at 833 (figures for 1960 and 1986); Nixon & Ward, *supra* note 48, at 5 (figures for 1910-1960). Different studies give slightly different numbers.

⁵¹ See Busterna, *supra* note 48, at 833 (deriving figures from total number of non-competitive dailies); Nixon & Ward, *supra* note 48, at 5 (same).

1880 - 61.4%
1910 - 57.1%
1920 - 42.6%
1930 - 20.6%
1940 - 12.7%
1954 - 6%
1960 - 4.2%
1986 - 1.9%

Moreover, the percentage of newspaper circulation sold under competitive conditions, that is, in multi-paper cities, has decreased at a relatively constant rate of roughly 10% per decade, shrinking from 88.8% of newspaper circulation in 1923 to 28.3% in 1978.⁵²

Third, there has been a relative decline in the price of newspapers in relation to both median income and the consumer price index.⁵³ If the cost of a paper is measured by cost per page, or cost per page of editorial content, the decline in cost has been even greater as papers have gotten bigger throughout the century.

Fourth, the hypothetical scenario suggested that the effect of a reduction in competition is that the single surviving paper would fail to fulfill the desires of some readers, thus tending to decrease circulation even as prices go down.⁵⁴ In contrast, if the reason for

⁵² See ROSSE & DERTOUZOS, *supra* note 18, at 58.

⁵³ This assertion is based on impressionistic reading of various information. In 1894, Charles Dana, editor of the *New York Sun*, could refer to a typical paper costing two or three cents. See MICHAEL SCHUDSON, *DISCOVERING THE NEWS* 99 (1978). In 1965, the average price of a paper was 8.3 cents, going up to 10.3 cents in 1970 (and 29 cents in 1988). See '89 FACTS ABOUT NEWSPAPERS 5, 20 (1989) [SRI # A2350-4 1989]. Meanwhile, one study of consumer prices provides an index going from 25 in 1900 to 94.5 in 1965 and 116.3 in 1970. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 210-11 (1975) (Series E 135-166), although another "implicit price index" changed from 24 in 1890 to 111 in 1965 and 135 in 1970; this table showed the per capita gross national product increasing from \$246 in 1900 to \$3525 in 1965 and \$4808 in 1970. See *id.* at 224 (Series F 1-5). Average annual earnings of employees after deduction for unemployment went from \$375 in 1900 to \$4780 in 1960. See *id.* at 164 (Series D 722-727). From the 1940-45 period to the 1965-70 period the size of newspapers doubled. See *id.* at 809 (Series R 218-223).

⁵⁴ The data are open to multiple interpretations. For example, if circulation declines it could be because of competition with new media products such as television, or new ways to spend leisure time, or reduced reading on mass transit going home from work—a factor purportedly contributing to the reduction in evening dailies in contrast to morning papers. If circulation rises, it could partly reflect increases in disposable income, changes in literacy, or reduced multiple reading of the same paper.

the decline in competition is merely that economies of scale mean that one firm is more efficient and thus can sell the same product at a lower price (or a better product at the same price), the expectation would normally be that the decline in competition would increase circulation.⁵⁵ Data is somewhat unclear. One study which had predicted that competition would have no effect on circulation, found the hypothesis to be "only marginally tenable at this time."⁵⁶ According to the author, "[h]istorically, the loss of a daily has meant a net loss in market circulation—the survivors do not acquire all the subscribers of the deceased. Thus at one time, total market circulation was sensitive to the number of dailies in it, though that may not be the case now."⁵⁷

Since 1923 and until about 1970, circulation per person in this country remained relatively constant. The arguably more relevant figure, circulation per household, declined about 32% between 1953 and 1977.⁵⁸ Even per person circulation has decreased since 1970,

⁵⁵ Alternatively, once becoming a monopolist, a paper may raise prices to obtain monopoly profits, thereby causing a reduction in circulation. This possibility is unlikely to be the dominant effect if there are: i) comparatively low barriers to entry; or ii) monopolistic competition with other news/entertainment sources. Although the relatively high profitability of monopoly papers suggests that to some extent these papers increase prices, the increased profitability could reflect increases in cover price, increases in advertising rates, or reduced expenditures on first copy, that is, reduced editorial expenditures. There is at least some reason to expect that it will be primarily a result of the last two. See, e.g., W.M. Corden, *The Maximization of Profit by a Newspaper*, 20 REV. ECON. STU. 181, 188 (1953) (showing that at profit maximizing point, circulation revenue will predictably amount to a loss that is covered by profits on advertising).

⁵⁶ William B. Blankenburg, *Structural Determination of Circulation*, 58 JOURNALISM Q. 543, 548 (1981).

⁵⁷ *Id.* at 548-49. During the 1965 to 1975 period, New York, Chicago, Boston, Washington, and Newark each lost one or more papers. Although surviving papers in these cities gained an average of 8.6% in circulation, in each city total circulation declined, the average decline being 21.8%. See JON G. UDELL, *THE ECONOMICS OF THE AMERICAN NEWSPAPER* 103-04 (1978).

⁵⁸ See ROSSE & DERTOUZOS, *supra* note 18, at 54 (showing circulation ranging around 30 per 100 since 1923, but declining from 1.26 per household in 1953 to .97 in 1973); see also BENJAMIN M. COMPAINE, *THE NEWSPAPER INDUSTRY IN THE 1980S: AN ASSESSMENT OF ECONOMICS AND TECHNOLOGY* 29 (1980) (decline from 1.24 per household in 1950 to .84 per household in 1977).

The number of readers per copy is also relevant. If competition contributed to a desire for the media product and if that desire translated into more readers per copy, then a decline in competition combined with a constant number of papers sold per population might mask a true decline in readership. James Curran reports that in England, the typical number of readers per copy of national newspapers in the 1970s was two to three compared with approximately 20 readers per copy of cheap unstamped (untaxed), radical working-class papers in the 1830s, and probably even

declining over 14% from 305 per thousand people to 251 per thousand in 1990.⁵⁹ The failure of a decline in price to cause a rise in circulation cannot be explained by any theory that the market is saturated. Our rate of purchase of newspapers is not high, compared with readership in other countries. In the late 1980s, purchase rates per thousand population were: Japan 566; Finland 551; Sweden 526; Switzerland 504; United Kingdom 421; West Germany 347; United States 259; France 193.⁶⁰ Competitive papers with noticeably different content that appealed to differing portions of the population might stimulate greater demand in the United States.⁶¹

Thus, as advertising became more prominent in newspaper's revenue, price declined—but so did competition and readership. This result corresponds precisely to the hypothetical scenario.

more readers per copy, with estimates as high as 50-80, of the more expensive, stamped radical papers published during the middle of the nineteenth century. See Curran, *supra* note 26, at 202 & n.13.

⁵⁹ See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 556 (111th ed. 1991).

⁶⁰ See *id.* at 845.

⁶¹ Of course, there are other theories of why the reduction in price has not lead to greater newspaper consumption. The most common explanation is to emphasize the competition of other media, especially broadcasting, which has also been frequently given as the explanation of why there has been a decline in competitive daily newspapers. See, e.g., Nixon & Ward, *supra* note 48, at 11 (discussing intermedia competition). However, most such claims provide little evidence in support and are presented more as speculation. Cf. *id.*

In contrast, in arguing that "[i]ntermedia competition should not be considered an acceptable alternative to newspaper competition," Lacy cites more recent studies that indicate that although "there is intermedia competition for advertising, . . . research also indicates little impact of such competition on circulation." Stephen Lacy, *Effect of Intermedia Competition On Daily Newspaper Content*, 65 JOURNALISM Q. 95, 99, 96 (1988). Another study investigated whether, during the 1930 to 1940 period, the decline of newspaper competition could be explained by the presence of a radio station in the community, but found the evidence did not support this hypothesis. See Neurath, *supra* note 49, at 238-41.

Another possible cause of decline of readership may be merely lack of a quality newspaper product reflecting a failure to devote resources to providing a desired product—and if this is "a" cause, approaches such as the TA-SR proposal, *infra* notes 284-93 and accompanying text, could induce greater investment. A recent article about increasing newspaper readership gave as examples the *Leesburg (Fla) Daily Commercial*, which increased paid circulation in a few months from 17,505 to 30,805, and the *Spartanburg (S.C.) Herald Journal*, which increased circulation from 47,661 to 55,404 during the 1985-87 period. Both papers underwent redesign, expanded the newshole (keeping it above 50% compared to a reported industry average of 37% of space), and increased the editorial staff, from 24 to 38 at the *Daily Commercial* and 36 to 54 at the *Herald-Journal*. See Gene Goltz, *Reviving A Romance with Readers Is the Biggest Challenge for Many Newspapers*, PRESSTIME, Feb. 1988, at 16, 19-20.

It would be important to know what would happen if the reverse occurred, if the role of advertising were reduced. On both the traditional account, in which advertising subsidizes the media, and the scenario offered here, in which advertising causes a reduction in the media's orientation toward satisfying reader preferences, reducing advertiser support should force the media to increase its price to readers. However, on the traditional account, this price increase should result in a significant decline in circulation, while on the account offered here, the decline in advertising support should lead to an increased emphasis on satisfying the reader, a media focus that would limit the decline in circulation and might even lead to increased circulation.

In their study of American magazines, John Tebbel and Mary Ellen Zuckerman report that although advertising had previously accounted for approximately two thirds of magazines' revenue, during the 1980s this percentage steadily declined until it was only 48% in 1987, with the decline apparently continuing since.⁶² Predictably, cover and subscription prices increased during this period but, more interestingly, paid circulation also increased 35% between 1979 and 1989.⁶³

D. *Is Advertising "A" Cause of the Decline in Competition?*

Although the historical data summarized above suggests that advertising may have been a major factor in the decline of daily newspaper competition, a better understanding requires consideration of alternative explanations and a more specific account of how advertising could have produced this hypothesized effect.

Several explanations can be easily ruled out. The decline in competition cannot be explained by economic or technological changes that require profitable modern papers to have a large circulation base. In 1989, 52% of our country's daily newspapers were located in cities of under 25,000.⁶⁴ In 1985, 39% of all daily papers in this country had circulations of less than 10,000.⁶⁵ Small

⁶² See JOHN TEBBEL & MARY ELLEN ZUCKERMAN, *THE MAGAZINE IN AMERICA*, 1741-1990, at 365, 373 (1991).

⁶³ See *id.* at 373. Many factors influence media trends so other explanations other than that offered here are, of course, possible.

⁶⁴ See U.S. DEP'T OF COMMERCE, *supra* note 59, at tbl. 934. These papers accounted for 13.8% of paid daily newspaper circulation. See *id.*

⁶⁵ See DUNNETT, *supra* note 18, at 67. This accounted for about 6% of total circulation. *Id.*

towns and small circulations routinely support daily newspapers. Today, however, much larger populations typically do not support competing papers.

The explanation that newspapers are generally unprofitable is also unavailing. All studies suggest the opposite. In terms of percentage return on sales, newspapers are possibly twice as profitable as the median Fortune 500 company.⁶⁶

So why the decline in competition? According to media critic Ben Bagdikian, the cause is "mass advertising."⁶⁷ He argues that "[t]he process by which mass advertising has produced monopoly and monopoly like media is not a mystery except in the silence with which the subject is treated in the media."⁶⁸ Bagdikian's explanation is that, as a newspaper gains market share of circulation, it gains greater revenue than its competitors from both sales and advertising; with this greater revenue, it can "spend more on salespeople, on editorial vigor, and on circulation promotion" while the competing papers have progressively less to spend on these items, which increases their competitive disadvantage and assures their continual shrinkage.⁶⁹ The publisher of the *Honolulu Advertiser* made virtually the same argument:

[A] newspaper's economic strength depends largely on its advertising revenues, which in turn depend on readership. Since readership depends on content, which includes advertising as well as news matter, the process is almost a vicious cycle: a drop in advertising dollars means a drop in money that can be spent for promotion and editorial content, which leads in turn to a drop in

⁶⁶ See 2 WORLD PRESS ENCYCLOPEDIA, *supra* note 18, at 977 (establishing the median return-on-sales for publicly owned newspaper-owning firms at 9.6% and the median return-on-sales for Fortune 500 companies at 4.8%). Benjamin Compaine's composite large city newspaper for 1978 had a (pre-tax) operating profit of 20.7% of revenue; his average medium size daily had an operating profit of 31.4%. See COMPAINE, *supra* note 58, at 18-20. Bagdikian, who describes newspapers as "fabulously profitable," reports returns on equity of 17.1%, with only five other industrial groups having higher returns. See BAGDIKIAN, *supra* note 18, at 119, 265 n.119.

⁶⁷ See BAGDIKIAN, *supra* note 18, at xi, 119. "Mass advertising" is distinguishable from other forms. According to Bagdikian, it has arisen over the last two generations and consists of that advertising purchased mainly by large regional and national merchants aiming at an audience spread over wide geographic areas. Basically, Bagdikian argues, the large, chain retail outlets have used mass advertising to "kill off" smaller, locally owned stores. See *id.* at 120-23.

⁶⁸ *Id.* at 122.

⁶⁹ See *id.* at 123.

circulation, which leads to a further drop in advertising, and so forth.⁷⁰

The problem with this explanation is that the same dynamic should occur even if the papers obtained all their revenue merely from circulation—a circulation increase for one paper would increase its revenues and allow greater expenditures on product quality, enabling it to win circulation away from its competitors who then would have even less to spend. That is, advantage for one newspaper would push others into a downward revenue/circulation spiral.

More generally, Bagdikian's explanation merely illustrates that a firm with declining marginal costs tends to be a natural monopoly. Advertising could be removed from the circle, and the cycle would still be vicious.⁷¹ Any profitable increase in circulation will allow the paper to spend more on editorial content, which should further increase its circulation, and so on until it eventually drives out its competitor.

For newspapers, this declining-marginal-cost dynamic occurs because a significant portion of their costs are "first copy costs"—the costs of reporting, editing, and composition.⁷² There may be additional economies of scale in other expensive aspects of newspaper production, particularly distribution.⁷³ Even if all of a

⁷⁰ Humphrey, *supra* note 6, at 951 (quoting Thurston Twigg-Smith, *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2, at 613 (1967)). Like Bagdikian, Humphrey concludes that this argument shows that advertising is the problem and that only legislation that "mitigate[s] reliance upon advertising" can stop the trend toward monopoly. *See id.*

⁷¹ Reliance on advertising might speed up a downward spiral. One study has suggested that the dependence of revenue on two channels, advertising and sales, might "amplif[y] the effect of changes in output upon profits," thus making predation and ruinous competition more likely. *See* Randolph E. Bucklin et al., *Games of Survival in the US Newspaper Industry*, 21 *APPLIED ECON.* 631, 636 (1989).

⁷² First copy costs have been found to be about half of total cost for mass circulation papers and 40% for smaller-circulation dailies. *See id.* According to another study, in 1978, editorial expenses for a composite large city newspaper were 9% of revenues, 11% of costs (20% of revenues were pre-tax profits), and 17% of direct (variable) costs. For a medium size daily, the corresponding percentages were 12.6%, 18.4%, and 29.4%. *See* COMPAINE, *supra* note 58, at 18-20. Even though composing room costs have dipped sharply in the 1970s, these first copy costs remain significant, averaging 4.6% to 7.0% of revenues depending on the size of paper. *See id.* at 149.

⁷³ Surprisingly, Peter Dunnett asserts that "there is little evidence for either significant economies of scale or diseconomies of scale when based on a per copy basis in the newspaper industry." DUNNETT, *supra* note 18, at 48. Dunnett argues

newspaper's revenues came from circulation, the paper with the larger circulation would have the advantages Bagdikian described and, at least on the argument he gave, should become a monopoly. Neither his example nor his discussion shows why advertising—even "mass advertising"—is a unique part of the problem.

Thus, the decline of local newspaper competition could be the natural result of tremendous economies of scale. The declining marginal costs of increased local circulation could make a local newspaper a natural monopoly. Effectively presenting this view, James Rosse shows that "economic competition between two similar newspapers seeking to attract the same audience cannot survive in the long run," and argues that such competition has led to the prevalence of one-newspaper towns.⁷⁴ The first copy is essentially a "public good"—unlimited numbers of copies can be made available without any additional costs for news gathering, editing, and composing. Rosse explains that competition is doomed because of this "public good" quality of newspapers, combined with other scale economies.⁷⁵ These additional scale economies include a continuous decline in the average reproduction costs as the number of copies increases and predictably smaller distribution costs for one newspaper serving a given group of readers than for two papers attempting to serve the same group.⁷⁶ These scale economies mean that it is always cheaper for the dominant firm to increase the supply than for any other firm, such as an alternative newspaper, to supply a similar good. Thus, economies of scale have been "pivotal" in the growth of single newspaper towns. Each firm faces declining marginal costs, the key condition for natural monopoly.

that the single copy is the appropriate unit of comparison since it is the product people buy. He finds diseconomies of scale in newsprint, production, advertising sales, and distribution, no significant economies of scale in editorial content, and some evidence of economies of scale in administration costs. *See id.* at 43-48.

⁷⁴ *See* ROSSE & DERTOUZOS, *supra* note 18, at 63-64.

⁷⁵ *See id.* at 27-28. This economic condition makes the model of monopolistic competition the appropriate economic model to analyze the industry. *See id.* at 21-26. *See generally* EDWARD H. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1960).

Rosse and Dertouzos's analysis is widely supported by other commentators. *See, e.g.*, 2 *WORLD PRESS ENCYCLOPEDIA*, *supra* note 18, at 979 (stating that "economics of scale have played a pivotal role in the dominance of one-newspaper towns"); Bucklin et al., *supra* note 71, at 646 (supporting Rosse's characterization and finding, through their own study, "results [that] certainly support the general indications that the trend toward monopoly in US central-city newspaper markets is largely inevitable").

⁷⁶ *See* ROSSE & DERTOUZOS, *supra* note 18, at 63.

Rosse, however, recognizes that there are circumstances in which competition would be possible. Specifically, a newspaper would have "to isolate a market segment and differentiate the newspaper product;" despite that possibility, "the historical record demonstrates" that in this country effective segmentation of local audiences has not been successful.⁷⁷ Still, given a declining cost industry, segmentation or product differentiation is necessary for successful competition;⁷⁸ if papers serviced sufficiently different consumer demands, competing local papers presumably could survive. Therefore, understanding the end of local newspaper competition requires an explanation of the decline of economically relevant market segmentation and product differentiation. On this issue Rosse must be expanded upon. This expansion is where critics of the role of advertising become relevant.

Rosse suggests several possible explanations. Market segmentation would decline: 1) if advertising clients became more homogeneous, possibly because some were bled off by other media; 2) if advertisers' preference for differentiated audiences weakened; 3) if subscriber demand shifted downward; or 4) if reader preference for a tailor made newspaper product (a Republican or Democrat paper, for instance) weakened.⁷⁹ This list is fine as far as it goes. It recognizes that one purchaser who could want, or not want, a differentiated product is the advertiser. This description, however, ignores how advertising can reduce the economic influence of reader's preference. I will argue that, in several identifiable ways, advertising undermines the influence of readers' desire for differentiated, that is, diverse, newspaper perspectives.

Survival of competing newspapers requires product differentiation that responds to market segmentation. But what is the product? The obvious answer is newspaper content—that is, what readers buy. But when the analysis includes the additional purchaser, the advertiser, it is clear that a reader's purchase of a paper constitutes the delivery by the newspaper of two products,

⁷⁷ See *id.* at 64.

⁷⁸ See James N. Rosse, *The Decline of Direct Newspaper Competition*, 30 J. COMM. 65, 67 (1980) (stating that the "fundamental long-run cause of newspaper failure is loss of effective newspaper market segmentation"). Another study notes: "Formal theories of ruinous competition assume a homogeneous product . . . It is, therefore relevant that historical accounts of US newspaper markets . . . stress the decreasing differentiation of newspapers in terms of alignment with particular political parties, social classes, or ethnic groups . . ." Bucklin et al., *supra* note 71, at 637-38.

⁷⁹ See Rosse, *supra* note 78, at 69-70.

newspaper content sold to the reader and a "reader" sold to the advertiser. For the moment, assume that the advertiser treats all readers as interchangeable but that readers will pay some amount for a differentiated paper. Introducing the second purchaser (the advertiser) for whom segmentation is irrelevant⁸⁰ reduces the proportionate contribution to total revenue of the amount that the reader will pay in order to have a differentiated product. The advertiser's involvement reduces the significance to the seller of the reader's willingness to pay for differentiation. Increasing the economic contribution of the advertiser should increase the paper's willingness to give up "differentiation" revenue in order to increase circulation. This is the point repeatedly made, but never fully explained, by Bagdikian: "Before mass advertising . . . papers succeeded solely because they pleased their readers" and that, at that time, "[r]eaders were clustered in terms of their serious political and social ideas."⁸¹ A simple example can make the point more starkly.

Assume two competing papers, each with a circulation of a hundred relatively loyal readers and each selling for 10 cents a copy. A typical reader would switch to the alternative paper only if it undersold her preferred paper by slightly more than a nickel. Put simply, she is willing to pay 5 cents for diversity. Obviously neither paper would reduce its price to 4 cents, thereby driving the competing paper out of business and obtaining its 100 readers. Even if doubling circulation imposed no costs on the paper, a fanciful assumption given the costs of newsprint and distribution, this competitive success would hurt the paper. Rather than obtaining \$.10 times 100 or \$10, the paper would now receive \$.04 times 100 from the old customers plus a \$.04 times 100 from the new customers, a total of \$8. Given additional costs for items like more newsprint, the move is clearly absurd.

Now assume readers' preferences and willingness to pay for diverse products have not changed, but that advertisers are introduced who are willing to pay newspapers \$.07 for every reader,⁸² in addition to paying the direct costs of added newsprint,

⁸⁰ "Irrelevant" means in terms of readers within a geographical area. To the extent advertisers are local, they strongly reward geographical segmentation, such as "local" daily papers and, more recently, zoned editions. Much of the present structure of the industry reflects this point.

⁸¹ BAGDIKIAN, *supra* note 18, at 125. He also argues: "Pursuit of advertising . . . reduced the media's responsiveness to reader desires. Publishers became more dependent on advertising revenues than on reader payments." *Id.* at 176.

⁸² Of course, advertisers would like to pay less and, under competitive conditions,

ink, and costs related to the additional bulk necessary for the newspaper to include their ads. Now that the newspaper also sells to advertisers, lowering the price to the reader causes a smaller proportionate loss of the revenue it obtains from the old customers, that is, it does not reduce the amount the paper receives *from the advertiser* for the old readers. In addition, lowering the cover price potentially produces a larger proportionate gain from adding the new readers. A paper obtaining 100 (\$.10 + .07) or \$17 from its old circulation⁸³ could reduce its cover price to \$.04, drive its competitor out of business, and increase profits, now receiving 200 (\$.04 + .07) or \$22. By introducing this joint purchaser of the newspaper, one that is not concerned with diversity, the proportionate revenue contributions to be made by responding to the readers' desire for a differentiated product are significantly reduced. Thus, advertising can lead to less product differentiation, thereby creating the condition necessary to natural monopoly.

Of course, the process of one paper gaining the other's readers would be contested. Both papers would compete for advertisers—predictably reducing the gains from obtaining the advertising. Only when one paper gains a circulation lead on which it can capitalize is it able to drive out the competition and obtain the economic rewards described above. This reflects the observation that today, in most two-newspaper towns, circulation is quite evenly divided; only a relatively even division allows an (unstable) equilibrium.⁸⁴ But this story cannot be complete. Advertising has been a major contributor to newspaper revenue going back to times when even small towns had several papers.⁸⁵ Something more must be said before the decline of competition can be blamed on advertising.

they might be able to. Still, this seven cents after advertising expenses obtained from advertisers compared to ten cents from subscribers is plausible. In Reddaway's classic study, London's "quality" national dailies made 5 *d.* per copy from advertising (after advertising expenses) compared to 4 *d.* per copy from circulation (although the advertising profit per copy was much less for the "popular" dailies). See Reddaway, *supra* note 20, at 206-07.

⁸³ In the example, the ten cents and seven cents are not strictly comparable since the ten cents is total revenue from readers and the seven cents from advertising is assumed to be after expenses for advertising are taken out. Therefore, the totals, \$17 (and \$22 in the next hypothetical) are neither revenues nor profits but instead revenues after deducting advertising expenses.

⁸⁴ See generally Bucklin et al., *supra* note 71, at 634 n.3, 636 (stating that "[t]o the extent that [the interdependence of advertising and circulation demands] amplifies the effect of changes in output upon profits, predation will become more likely").

⁸⁵ See *supra* text accompanying notes 37-47.

The discussion above understates and under-describes advertising's effect in undermining the influence of readers' willingness to pay for differentiated products. First, the simplifying assumption, that advertisers are indifferent to who the readers are, must be dropped. Advertisers want the readers most likely to buy their products. Depending on the medium's advertisers, a variety of types of media differentiation might result. Certainly, advertisers' audience-preferences help explain profitable special interest magazines that attract advertisers who sell related products.⁸⁶ Therefore, the nature of advertisers who do (or the potential advertisers who might) advertise in local newspapers merits examination. Without arguing the point, I suggest that daily newspapers depend primarily on commercial advertising biased toward a very broad, relatively undifferentiated, middle to upper-middle market of people with comparably large disposable incomes.⁸⁷ As Michael Schudson puts it, "marketers keep their eyes on the main prize—pocketbooks, not persons."⁸⁸ This can be a strong preference. A classic, 1960 study of English daily newspapers reports that the advertising rate per copy sold was 3.9 times higher in the "quality" national dailies than in the "popular" national dailies.⁸⁹ After paying the expenses of publishing the ads, the popular daily received a 1/2 *d.* "subsidy" per copy from advertising, which could go to profits or to pay for costs such as editorial expenses. In contrast, the "quality" paper received a 5 *d.* per copy "subsidy" from advertising.⁹⁰

⁸⁶ Although newspapers are generally oriented toward a relatively affluent, undifferentiated audience, advertiser interests in special segments of this group influence both newspaper content and layout. Many of newspapers' specialized sections have advertisers for particular product consumers in mind—a food section for grocery ads, a science section for computer advertisers, a real estate section for real estate advertisers. Fashion would undoubtedly be less of a news item without department store advertisers.

⁸⁷ The one-person-one-vote distribution of votes in political elections might induce political advertising to be less biased toward people with disposable income. Candidates' dependence on campaign contributions and on opinion leaders, however, could again bias results toward a comparably upscale market.

⁸⁸ SCHUDSON, *supra* note 12, at 236.

⁸⁹ See Reddaway, *supra* note 20, at 207.

⁹⁰ See *id.* at 206-07. This compares to a cover price of 2 1/2 *d.* for the "popular" and 4 *d.* for the "quality." The "quality's" greater profits from advertising comes from somewhat more pages of advertising per issue as well as higher rates. In Reddaway's "representative" papers, advertising represented 8 of 19 pages in the quality, and 5 of 14 pages in the smaller popular paper. See *id.* at 207.

If different income groups prefer different newspaper content, either of two results is possible. Market segmentation could occur and support competing newspapers,⁹¹ or the newspaper most read by readers targeted by advertisers may gain sufficient strength, using advertising revenue to reduce cover price or to add features, that it drives out the competition.

The second possibility, eliminating competition, has prevailed among daily newspapers in the United States.⁹² Even if monopoly is the worse outcome, advertiser-oriented segmentation is also troublesome. Advertising generally favors the paper with relatively more affluent readers, subsidizing the content that they prefer.⁹³ Even if this favoritism does not drive papers with competing perspectives out of business, the subsidy magnifies the normal inequality of the poor having less money to pay for media products than the wealthy. A subsidy for papers preferred by the more affluent dramatically biases our information environment—in the direction opposite of what the democratic one-person-one-vote principle would require. The poor must either pay almost the full cost of the media product they prefer, if it is available, or purchase media content that they would not choose if both their favored and the other paper were sold at full cost. In contrast, advertising works to the benefit of the more affluent: their preferred media product is made available at considerably below cost.

When readers pay the costs, newspapers can gain by responding to desires for product differentiation. Although not obtaining all potential readers, a paper can sell at a higher price by providing a successfully differentiated product. This opportunity obviously affects content. For example, lampooning or exposing the evils or the political wrongheadedness of its non-readers could contribute to valuable product differentiation. Partisanship can be profitable.

When advertisers pay for readers, incentives change. The paper has an increased incentive to gain readers, in part by lowering

⁹¹ Reddaway, making the same point as Rosse, argues that monopolistic competition in an industry with great economies of scale, like the newspaper industry, is likely to lead to a small number of producers in each product class. However, Reddaway notes that there is no logical limit to the number of product classes. *See id.* at 218.

⁹² New York City is probably the major exception. Some diversity also exists because of specialized markets that often take forms other than a daily paper—for example, many minority, foreign language, and religious papers are weeklies, and sometimes national.

⁹³ *See infra* text accompanying notes 244-56.

prices. But at the lower price, the paper gives its old reader a boon, an unnecessary consumer surplus. While the old reader had been willing to pay more than the new lowered price, the new reader now buys only because of the lowered price. The paper, however, might find a more cost effective strategy. It could "spend" what otherwise would have been consumer surplus to the old reader on content changes favored by potential new readers. This change permits the paper to adopt a smaller price reduction than would be necessary by itself to gain the new readers. A limited content change may eliminate some of the "consumer surplus" that the old reader receives from the price reduction, but that entices the new reader to pay a higher price than possible if the content were kept the same. The key point, however, is that this advertising regime provides an incentive to the newspaper to reduce product differentiation.

What content changes might appeal to potential new readers but not be too costly in terms of old readers? At a very general level, the paper might economically drop material that is offensive or otherwise unappealing to the new reader—the lampooning and partisan exposés that the old reader valued.⁹⁴ Dropping this "offensive" material may also be affirmatively desired by advertisers, who fear offending, and thereby losing, any potential customers. Then the question becomes whether this exclusion of offensive material be routinized. Possibly the ideal method to avoid offense is to appear to be more "objective," taking less of an (overt) position in the presentation of the news.⁹⁵

This account of possible consequences of introducing advertising corresponds to the actual changes that occurred during the late nineteenth and early twentieth century. During this period, the economic contributions of advertising and the role of advertising agencies, which gave advertisers more self-conscious muscle, increased. The most significant content change was the move away

⁹⁴ See BAGDIKIAN, *supra* note 18, at 178 (stating that "[n]ewspapers neutralized information for fear that strong news and views pleasing to one part of the audience might offend another part and thus reduce the circulation on which advertising rates depend").

⁹⁵ This refers to objectivity as it has come to be seen in American journalism. In his critique of the role of objectivity in preventing exposure of the Reagan Presidency, Mark Hertsgaard quotes I.F. Stone: "Objectivity is fine if it's real Every society has its dogmas, and a genuinely objective approach can break through them. But most of the time objectivity is just the rationale for regurgitating the conventional wisdom of the day." MARK HERTSGAARD, *ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY* 65-66 (1989).

from political partisanship and toward objectivity. According to one commentator, "[e]arly in the 19th Century, American editors demonstrated a remarkable dedication to party service, working as party organizers and using their newspaper columns to promote parties and candidates."⁹⁶ In 1850, census data showed that 95% of all U.S. newspapers had a political affiliation.⁹⁷ Even when journalistic independence became popular, it often meant only that the newspaper maintained sufficient distance to criticize its party for failing to live up to the party's ideals.⁹⁸ Party allegiance often continued during the middle of the century even as the paper proclaimed independence. For example, while disavowing partisanship, Horace Greeley in the 1840s could still seek Whig party patronage to help support his paper.⁹⁹

But this partisanship died out late in the century, roughly the time when objectivity became the dominate norm. A study of all English speaking papers, including weeklies, found that 42% of 813 New York papers and 44.7% of the 392 California papers were "independent" by 1899.¹⁰⁰ Moreover, independent papers dominated numerically everywhere except in medium-sized cities (with two or more papers), where papers were roughly 70% partisan, and over 80% partisan in county seats.¹⁰¹ The survey showed that competition correlated positively with partisanship—whether because competition required product differentiation or because forces inclining toward partisanship also produced competition. Similarly, the absence of partisanship correlated with monopoly status—in cities with a newspaper monopoly, 65% of the papers were independent.¹⁰²

The decline of partisanship could have reflected changes in political parties or in internal development of journalistic norms.

⁹⁶ Gerald J. Baldasty & Jeffrey B. Rutenbeck, *Money, Politics and Newspapers: The Business Environment of Press Partisanship in the Late 19th Century*, 15 JOURNALISM HIST. 60, 63 (1988).

⁹⁷ See *id.* at 68 n.1.

⁹⁸ See HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 48-49, 114-15 (1989) (stating that "independent seemed to mean that a paper had no formal alliance" but still "espoused ideals and promoted leaders of a favored party").

⁹⁹ See *id.* at 114.

¹⁰⁰ See Baldasty & Rutenbeck, *supra* note 96, at 62.

¹⁰¹ See *id.* at 63, 65 (finding that county seats offered greater opportunities to obtain political patronage, and that therefore an advertiser-induced orientation toward "objectivity" or independence would be predictably less effective).

¹⁰² See *id.* at 68.

However, both historical evidence and commentary at the time points to a significant role for advertising. Gerald Baldasty quotes late nineteenth century newspaper trade journals for the proposition that "advertisers wanted newspapers to de-emphasize politics and present 'more of the bright side of life.'" ¹⁰³ These "trade journals warned editors that advertisers wanted less criticism of public officials and reminded publishers that partisanship hurt circulation and, consequently, advertising revenues. The *New York Evening Post* in 1898 noted that strongly partisan newspapers simply could not sell advertising space."¹⁰⁴ Newspaper trade journals also explained that political affiliation was suicidal in small towns because it encouraged the opposing party to establish a paper. With only limited advertising support, the trade journals predicted, both papers would die.¹⁰⁵

Today, objective news reporting is unquestionably the "most pervasive ethic of American journalism. . . . Objectivity forms the core of the Code of Ethics of the Society of Professional Journalists" ¹⁰⁶ Like the reduction of political partisanship, the rise of objectivity as the press's dominate norm is a complex development. Scholars dispute its causes (and timing). Although "Walter Lippmann introduced the term 'objective reporting' in . . . 1919 . . . and seems to have been the first to discuss objective journalism in . . . 1920, . . . [and] Nelson Crawford's widely used 1924 journalistic ethics text propagated the ideal,"¹⁰⁷ it is likely that this self-conscious emphasis on objectivity merely ratified a protracted evolution of practice. Defining objectivity as a "reportorial form" that "contains only verifiable assertions, does not make claims to significance, and avoids statements of . . . value . . . without clear attribution to source," a study of news reports from three periods found objective reporting constituted 41% of the sample in 1865-74, 66% in 1905-1914, and 80% in the 1925-34 period.¹⁰⁸ Contrary to a popular theory attributing objectivity to technological developments, the study found that whether the news report's source was

¹⁰³ *Id.* at 65 (quoting *The Newspaper Maker*, Apr. 18, 1895, at 4).

¹⁰⁴ *Id.* (footnotes omitted).

¹⁰⁵ *See id.* at 66.

¹⁰⁶ *See* Harlan S. Stensaas, *Development of the Objectivity Ethic in U.S. Daily Newspapers*, 2 J. MASS MEDIA ETHICS 50, 50 (1986).

¹⁰⁷ *See* MARION T. MARZOLF, *CIVILIZING VOICES: AMERICAN PRESS CRITICISM 1880-1950*, at 123 (1991).

¹⁰⁸ *See* Stensaas, *supra* note 106, at 53, 55.

a wire report had "no statistical effect on whether the news is objective . . . in any of the three time periods."¹⁰⁹

Whatever the causes of the rise of the norm of objectivity, the same advertiser interests that opposed the press being "too" partisan could benefit from and be a significant influence on the development.¹¹⁰ One commentator observed that the balance in reporting that was absent in the first decade of the nineteenth century became dominant in the last, as newspapers "increasingly seemed to avoid controversy—most likely because it might alienate readers."¹¹¹ As William Greider, assistant managing editor of the *Washington Post* in the early 1980s, explained: "If you're going to be a mass circulation journal, that means you're going to be talking simultaneously to lots of groups that have opposing views. So you've got to modulate your voice and pretend to be talking to all of them"—that is, "become what we think of as quote objective."¹¹² Another commentator suggested that "structural change made newspapers rely heavily on advertising lineage, and the widest possible circulation increased the pressure to avoid offending readers. Sticking to a 'neutral rendition of the facts' was the answer. So, the ethical principle of objectivity was 'at least equally motivated by commercial considerations.'"¹¹³

In sum, there are economic reasons to expect, historical evidence to suggest, and contemporary consciousness to indicate that both the decline of political partisanship and the rise of objectivity were at least partly caused by newspapers' need to gain the circulation on which advertising income depends. These content changes corresponded to a decline in product differentiation on which competition depends. Thus, the increased role of

¹⁰⁹ *Id.* at 55. The view that the introduction of the telegraph and news services contributed significantly to the rise of objectivity is also disputed in SCHUDSON, *supra* note 39, at 34-35. But cf. Donald Shaw, *News Bias and the Telegraph: A Study of Historical Change*, 44 JOURNALISM Q. 3, 31 (1967) (suggesting that increased use of telegraph news by newspapers correlated to declining levels of bias).

¹¹⁰ In contrast, if the cause of the trend away from political party papers had been, for example, a desire that the papers adopt a more opinionated advocacy style or become more adversarial to all holders of power, objectivity, at least in the form that it has taken in American journalism where objectivity means basically quoting and seldom challenging government sources, would not have been the result.

¹¹¹ See DICKEN-GARCIA, *supra* note 98, at 229.

¹¹² See HERTSGAARD, *supra* note 95, at 78 (quoting William Greider).

¹¹³ See MARZOLF, *supra* note 107, at 121 (quoting GEORGE JUERGENS, *NEWS FROM THE WHITE HOUSE: THE PRESIDENTIAL-PRESS RELATIONSHIP IN THE PROGRESSIVE ERA* 6 (1981)).

advertising provides a major explanation for the decline of competition and the increased local monopoly of the daily newspapers.

E. *The Significance of Newspaper Competition*

1. Does Competition Matter?

The discussion thus far has implicitly assumed that competition among local daily newspapers is a meaningful, valuable phenomenon. This assumption is widely shared; considerable policy in this and other western democracies has been based on it¹¹⁴

and many commentators have explained its value.¹¹⁵ Nevertheless, a few commentators, frequently empirically-oriented communications scholars, have suggested that, like the three virtually identical network news programs, two competitive papers often are basically duplicative. This duplication arguably wastes resources, while a lack of competition does not systematically lead to a decline in either in consumer satisfaction or in the quality of the remaining paper. A monopoly paper's larger circulation and advertising base could even provide it with the financial resources to produce a better newspaper than is possible under competitive conditions, while the *potential* entry of a new paper or present competition from other mediums, such as broadcasting, could incline the monopoly paper toward this investment in quality.

In an interesting study, Litman and Bridges evaluated two purportedly competing hypotheses: 1) whether competition between newspapers stimulates consumer-oriented performance, while monopoly denies consumer freedom and misallocates resources; or 2) whether increased monopoly helps newspapers achieve efficiencies (allowing for cheaper provision of a better product) and stimulates technological progress.¹¹⁶ This study grew out of a debate that arose because many researchers had trouble finding actual evidence of benefits of (the occasional) competition among newspapers today.¹¹⁷ In order to find

¹¹⁴ Consider the Newspaper Preservation Act in this country. One of the few successful governmental efforts to maintain competition has occurred in Sweden, where this policy assumption has been clearly accepted. See *infra* notes 308-26 and accompanying text.

¹¹⁵ See, e.g., BAGDIKIAN, *supra* note 18, at 129 (suggesting a correlation between competition and quality of news presentation).

¹¹⁶ See Barry R. Litman & Janet Bridges, *An Economic Analysis of Daily Newspaper Performance*, 7 NEWSPAPER RES. J. 9, 10 (1986).

¹¹⁷ See, e.g., ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS* 91-101 (1989)

benefits to support the pro-competitive thesis, Litman and Bridges looked for evidence that competitive papers were more committed to quality, which they thought would be measured by financial commitment to quality. Their regression analysis of various criteria of financial support showed "moderate support" for the pro-competition view.¹¹⁸ A similar study found that competition affected papers' budget allocations, inducing them to subscribe to more wire services and use more reporters to fill a given amount of space.¹¹⁹

Although this pro-competitive conclusion is important, these studies are curious in their implicit assumption that the merit of competition would lie primarily in financial commitment rather than diversity of content—that is, product differentiation. This assumption may reflect the dominance of the ideology of objectivity in modern thought about newspapers.¹²⁰ These studies typically either compare newspapers in cities with competition to newspapers in otherwise comparable cities without competing dailies or compare a newspaper before and shortly after competition ended.¹²¹ An obvious problem is that these studies are prisoners of the investigator's need to find hard, quantitative measures of comparability; thus, they look at such things as the proportion of space allocated to different categories of news and find few differences. With such a methodology, a radical and a mainstream paper could appear identical. More important, given an observational methodology that requires analysis of existing newspapers, the studies do not show what competitive newspapers would be like under conditions that make competition viable. For example, accepting the argument made here about the effects of

(arguing that since regressions indicate that competition has little effect on content, the concern with the trend toward one newspaper towns may be overdrawn); John C. Schweitzer & Elaine Goldman, *Does Newspaper Competition Make a Difference to Readers?*, 52 JOURNALISM Q. 706, 710 (1975) (finding that, in general, the content of competitive papers is very similar and that the presence of competition does not matter much to the audience).

¹¹⁸ See Litman & Bridges, *supra* note 116, at 23.

¹¹⁹ See Lacy, *supra* note 33, at 288. As the author put it, "intense competition means a newspaper must spend more money to differentiate itself and to remain a substitute for its competitor." *Id.*

¹²⁰ These studies, however, should probably be excused from the charge that they ignored the possibility that competition would lie in product differentiation because, as they noted, other recent studies failed to find objective differences in content among competing papers. See Litman & Bridges, *supra* note 116, at 24 n.8.

¹²¹ See Lacy, *supra* note 33, at 282-83 (reviewing research on the relationship between competition and content).

advertising, the studies are ill-equipped to describe the form competitive papers would take where advertising exercised less influence.

Given evidence that market segmentation is a virtual prerequisite of survival among competing newspapers, successful, stable competition would predictably involve product differentiation. Competition would be valuable specifically if this diversity were valued, but the prediction that successful competition would involve product differentiation implies neither financial commitments nor different space allocations for different categories of news. The significance of competition between British quality and popular national dailies lies less in competitively induced financial commitments to editorial content (the popular papers apparently make the greater commitment¹²²) than in differential treatment and choice of content. This is likely to be even more true of our nineteenth-century competitive, partisan papers.

Competition may correlate negatively with a newspaper's revenues since it splits a fixed pool of potential advertising dollars and potential readers between two or more competitors. Because this single pool of revenue must pay for both papers' editorial content, increased financial commitment would not necessarily be expected.¹²³ Nevertheless, the Litman study suggests that, to some extent, it occurs. But even if competition did not result in greater financial commitment, that should not be a reason to reject the hypothesis of benefits of competition—at least under circumstances where competition could be expected to embody product differentiation. The last section argued that advertising undermines but that stable competition depends on product differentiation, that is, content diversity. If this argument is right, any current empirical study that finds no correlation between competition and diversity¹²⁴ either used inadequate tools to measure diversity, which is likely, or is viewing a world in which advertising has eliminated most diversity, which is even more likely. In this case the problem is not that competition lacks value but that

¹²² See Reddaway, *supra* note 20, at 209.

¹²³ *But cf. supra* note 33. Greater financial commitments might be possible either through a reduction of revenue going to profits, an increased capacity to derive revenue from readers due to the multiple products better satisfying their preferences, or a reduction of the negative effects of monopoly.

¹²⁴ *Cf. ENTMAN, supra* note 117 (finding that competition has little effect on content); Schweitzer & Goldman, *supra* note 117 (same).

the conditions of successful and valuable competition have already been, for now, destroyed.

2. Consequences for Politics

Non-differentiated newspapers and the related, modern, "objective" style of journalism may have had profound consequences for American democracy. At election time, "good-government, get-out-the-vote" rhetoric implies that widespread political participation or, at least, high voter turnout is an essential element of a living democracy. Commentators continually bemoan that voting in this country has been in steady decline¹²⁵ and is much lower than voting in most other western democracies.¹²⁶ Like explanations for the decline in partisanship and rise of objectivity in the press, accounts of the "vanishing voter" are complex. Still, the two could be related.

¹²⁵ Our first five Presidents were elected with participation of only 4 to 6% of the eligible electorate. During the Jacksonian era, turnout increased dramatically, rising to 57% in 1828 and 80% by 1840. Participation remained high throughout the rest of the century; the lowest rate recorded was 69.4% in 1852. This participation rate is believed to be "rooted in the highly partisan nature of political campaigns." RUY A. TEIXEIRA, *WHY AMERICANS DON'T VOTE* 8-10 (1987). A downturn occurred between 1896 and 1912, giving rise to a scholarly debate between those who attribute the decline largely to a weakening in the partisan character of parties and those who focus on changes in legal obstacles in voting. *See id.* at 10-11; FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE: TURNOUT DECLINE IN THE UNITED STATES, 1960-1984* 17 (1989) (emphasizing the latter view). As new legal restrictions "took effect between 1888 and 1924, voting rates fell: from 64% to 19% in the South; [and] from 86% to 55% in the North and West." *Id.* at viii.

¹²⁶ A table of turnout in recent national elections in twenty-four industrialized democracies placed the United States twenty-third, ahead only of Switzerland, where national elections are not very competitive and where the federal government plays a minor role as compared to the cantons. *See PIVEN & CLOWARD, supra* note 125, at 5. A turnout of 55.1% in the 1980 presidential election in the United States compares very unfavorably to the following typical European rates around 1980: 90.7% (Sweden), 90.4% (West Germany), 90.4% (Italy), 85.9% (France), and 75.9% (Great Britain). *See WALTER DEAN BURNHAM, THE CURRENT CRISIS IN AMERICAN POLITICS* 183 (1982).

The data from these European countries, as well as widespread voting in nineteenth-century America, belie the notion that the problem is that the poor and uneducated do not vote. *See id.* at 184; PIVEN & CLOWARD, *supra* note 125, at 15. Burnham notes that the people who do not vote in the United States, the "party of nonvoters," demographically occupy the place occupied by left parties in European countries. *See BURNHAM, supra*, at 188. Comparing two landslide elections in the United States, Burnham notes that the Republican Party candidate secured virtually the same degree of support from the potential electorate in each: Wendell Wilkie received 28.3% of the potential electorate in 1940 and Ronald Reagan gained his historic "mandate" from 28.0% of the potential electorate in 1980. *See id.* at 188-89.

Until late in the nineteenth century the press was strongly partisan¹²⁷—as well as often competitive within a single town. The plausible and intended result was that the partisan press reinforced partisan loyalty, partisan conflict, and general political excitement: “Traditional party journalism . . . eased readers’ participation in politics by creating an accessible political world. Party papers made politics seem important, simplified issues . . . and urged voters to display their political beliefs.”¹²⁸ If this characterization of the press is correct, high voting rates or other forms of political participation should be no surprise.

Initially, independent papers were still routinely committed to parties but merely claimed the right to criticize the party on the basis of the party’s principles.¹²⁹ However, the nature of independence and even of partisanship changed in the last decades of the nineteenth century. According to Michael McGerr, “the independent press gave broader expression to an essentially elitist political style. . . . [It] offered a less exciting political world than the one created by the old party sheets. . . . Independent journalism was, as Whitelaw Reid lovingly described it in 1872, a ‘passionless ether.’”¹³⁰ McGerr explains that “[w]ith the rise of the independent press . . . politics became less simple and accessible and the partisanship that sustained high voter turnouts lost its cultural hegemony.”¹³¹

Of course, the changed nature of the press needs explanation. I have argued that, largely as a consequence of advertising, papers have become increasingly homogenous. Given an advertising-oriented press, it is not even clear that much would change by adding more (non-partisan) competition. This may explain recent empirical studies’ difficulty in finding any significance in competition. But product differentiation that fosters a revival of partisanship, even if in a different form than the nineteenth-century version, could contribute to a renewal of politics and political participation.

¹²⁷ See, e.g., DICKEN-GARCIA, *supra* note 98, at 97 (indicating that the tradition of newspaper partisanship persisted long after a weakening of formal commercial ties to parties in the middle of the century).

¹²⁸ MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS* 135 (1986).

¹²⁹ See *id.* at 116-20.

¹³⁰ *Id.* at 121.

¹³¹ *Id.* at 122. McGerr also describes the other movement in the press during this period, the rise of sensationalism, and argues that it was a different means to a similar result. Rather than making politics inaccessible, sensationalism made politics irrelevant, a “matter of gossip about personalities.” *Id.* at 127. For a more complete discussion of sensationalism, see *id.* at 122-36.

In any event, as a historical matter, in addition to reducing product differentiation and destroying local competitive dailies, advertising may have contributed significantly to the decline of a partisan political culture and the corresponding political participation.

Likewise, the rise of objectivity as journalism's fundamental principle is extremely important. However, because this development has received frequent comment, I will only touch on the issue here. Ben Bagdikian correctly describes journalism as an "essentially subjective," constantly "value-laden" process, and argues that, under the rubric of objectivity, it has become "superficial," "official and establishmentarian."¹³² His and others' criticisms most often elaborate one or more of three points.¹³³ First, critics emphasize that the media's "gate-keeper" role, its selection of what to report and its decisions about how to treat the material, is heavily, inevitably, and *properly* value-laden. These critics sometimes note that objectivity has taken a form that requires attributable sources, and for various reasons the press relies primarily on governmental figures, thereby becoming "more conduit than critic of government."¹³⁴

¹³² See BAGDIKIAN, *supra* note 18, at 179-80. Michael Parenti, in critiquing the "myth of objectivity," quotes commentator Jack Newfield: "Objectivity . . . is believing people with power and printing their press releases." MICHAEL PARENTI, *INVENTING REALITY: THE POLITICS OF THE MASS MEDIA* 51 (1986) (quoting Jack Newfield, *Honest Men, Good Writers*, VILLAGE VOICE, May 18, 1972). See generally Gaye Tuchman, *Objectivity as Strategic Ritual: An Examination of Newsmen's Notions of Objectivity*, 77 AMER. J. SOC. 660 (1972) (analyzing how reporters rely on the conventions of objectivity as a means of insulating themselves from the "dangers" of their profession).

¹³³ Schudson offers similar criticisms: that the content, form, and process of objectivity are all biased in a manner that reinforces the status quo and official viewpoints. See SCHUDSON, *supra* note 39, at 184-86.

¹³⁴ HERTSGAARD, *supra* note 95, at 67 (quoting former *Washington Post* assistant managing editor William Greider). See also HERMAN & CHOMSKY, *supra* note 27, at 18-25.

A study of national and foreign news stories in the *New York Times* and the *Washington Post* examined 1146 front-page stories, excluding local stories, in sample weeks from 1949 to 1969. The study found the executive branch of the federal government dominated the news, accounting for about 38.5% of the stories. See LEON V. SIGAL, *REPORTERS AND OFFICIALS: THE ORGANIZATION AND POLITICS OF NEWSMAKING* 124 (1973). Official sources, a category encompassing the judiciary, Congress, state and local government officials, and officials of foreign governments and international agencies, accounted for 78% of the total. People who represent most of the world—typical citizens, oppositional leaders, scholars, labor leaders, political activists, environmentalists, etc.—accounted for only about 16.5% of sources. See *id.* at 119-130. This bias reflected to a significant degree differential reporter practices. Routine channels (as opposed to informal or reporter enterprise channels)

Second, the objective style has ideological content. Among other effects, it reinforces an image of the world that splits fact and value, reason and emotion; and it proclaims the special value of facts. Christopher Lasch forcefully argues that democracy depends on public debate—argument and discussion, not information (except as it is made relevant by, and is the by-product of, the debate). He concludes “that the job of the press is to encourage debate, not to supply the public with information.”¹³⁵ From this perspective, objectivity may be fundamentally at odds with democracy as a type of government and an approach to life. Lasch suggests that both debate and political participation began to decline around the turn of the century when newspapers became more “responsible,” more objective, and less journals of opinion.¹³⁶

Third, the “objective” style may be especially subject to manipulation by political actors outside press. Keen observers argue that the press’s version of objectivity, particularly the tendency merely to report statements of political elites no matter how stupid or demonstrably false, sustained the Reagan Presidency,¹³⁷ while the McCarthy era “showed how vulnerable journalistic objectivity was to manipulation by the demagogue.”¹³⁸

produced 58% of the stories’ sources and were primary in 71% of the stories. *See id.* at 121-22. Nongovernmental sources, however, constituted only 11.3% of the sources in routine channels but 28.8% of the sources in reporter enterprise channels. *See id.* at 126. A more recent study of front-page stories in 1979-80 confirmed Sigal’s results, again finding that a “disproportionate share of news is coming from elite sources,” especially from government and executives. *See* Jane D. Brown et al., *Invisible Power: Newspaper News Sources and the Limits of Diversity*, 64 JOURNALISM Q. 45, 51 (1987).

¹³⁵ Christopher Lasch, *Journalism, Publicity and the Lost Art of Argument*, GANNETT CENTER J., Spring 1990, at 1.

¹³⁶ *See id.* at 2. Lasch may have placed the date of the decline of argument a little late. According to Dicken-Garcia, “[t]he idea as the reason for newspaper items diminished steadily from being dominant in the earliest decade [of the nineteenth century] to virtual nonexistence by the 1890s.” DICKEN-GARCIA, *supra* note 98, at 229. By the 1850s, although the press remained highly partisan, the early emphasis on ideas on every page of the paper had given way to an event-orientation. *See id.* at 71, 82, 88.

¹³⁷ *See* HERTSGAARD, *supra* note 95, at 66-69.

¹³⁸ MARZOLF, *supra* note 107, at 128-29 (providing a general critique of objectivity); *see also* SCHUDSON, *supra* note 39, at 167-68 (explaining that during the McCarthy era “[r]eporters were angry that the conventions of their work required them to publish ‘news’ they knew to be false, but they did not abandon the conventions”).

II. ADVERTISING AND THE CONTENT OF A DEMOCRATIC PRESS

Part I described how advertising helps determine which newspapers exist, in part by causing a decline in content diversity and in part by rewarding particular, ideologically laden styles of journalism. These structural effects pervasively, even if only indirectly, control media content. But advertising more directly affects media's non-advertising content in at least four systematic ways. These effects can be characterized either as media's response to market pressures to increase and maintain advertising revenues or as advertisers "purchasing" content favorable to their interests. In any event, the incentive of advertising revenue encourages media to tailor message content: 1) to treat advertisers' products and their broader interests charitably in both news reports and editorials; 2) to create a buying mood that will induce readers or viewers to have more favorable reactions to advertisements; 3) to make content less partisan, and often less controversial, in order to avoid offending advertisers' potential customers and to increase the media's potential reach; and 4) to favor particular audiences, usually the middle-to-higher income audiences whose greater purchasing power advertisers value most.

Economic rationales for each of these effects are obvious. This section will offer illustrations of these four effects and speculate about their prevalence and significance. Some initial comments will help put that discussion in context.

First, these four effects are only a slice of advertising's influence on content. Advertising also dramatically influences content by itself constituting an incredibly large portion of media content—roughly 65% of newspaper space and 22% of television time.¹³⁹ I do not attempt to evaluate the obvious merits and demerits of advertising itself. A full assessment of the impact on advertising, however, would have to consider this issue. Advertising, which Michael Schudson calls "capitalist realism," is a major element of social life, shaping the nature of our culture of consumption.¹⁴⁰

¹³⁹ See BAGDIKIAN, *supra* note 18, at 153; MARTIN A. LEE & NORMAN SOLOMON, UNRELIABLE SOURCES 59 (1990).

¹⁴⁰ Schudson argues that as a "central *symbolic* structure . . . [a]dvertising may shape our sense of values even under conditions where it does not greatly corrupt our buying habits." SCHUDSON, *supra* note 12, at 210; *see id.* at 230-33. Elsewhere I have argued that, within a market economic system, the way advertising "creates" the world reflects market forces rather than individual value choices. In order to subject this force to human control, advertising should be subject to regulation based on political choice. This claim illustrates a more general justification for not equating "free

Moreover, advertising constitutes a large portion of the media's explicitly ideological messages. Michael Parenti cites a 1980 study for the claim that "[t]oday, one-third of all corporate advertising is directed at influencing the public on political and ideological issues as opposed to pushing consumer goods."¹⁴¹ Nevertheless, this section is limited to examining violations of the press's proclaimed wall of separation between the media's purportedly non-advertising editorial content and advertising.

Second, a fuller analysis would more carefully distinguish between different media. Each media varies somewhat in its susceptibility to each form of influence. Nevertheless, I will mix examples from various media, primarily newspapers and broadcasting but occasionally magazines, adding comments about whether a particular media is more or less vulnerable to a particular form of influence.

The degree of influence of advertisers will vary with the portion of the media's revenue provided by advertising.¹⁴² Advertisers

markets" with human freedom (although, of course, free markets of varying scope may be important, chosen elements of a free society). See BAKER, *supra* note 11, at 194-224.

¹⁴¹ PARENTI, *supra* note 132, at 67 (citing J.S. HENRY, FROM SOAP TO SOAPBOX: THE CORPORATE MERCHANDISING OF IDEAS 55 (Working Papers, May/June 1980)) (emphasis deleted); see also ERIK BARNOUW, THE SPONSOR 84-86 (1978). Barnouw describes ITT's effective use of ads to reverse negative public opinion about the corporation. He implicitly suggests that ITT's heavy advertising campaign may have also influenced news treatment of ITT. In 1973 and 1974, newscasts continuously featured negative material about ITT. Then, during first half of 1975, while ITT's "good-deed commercials" were being constantly shown on evening newscasts, the news programs did not mention ITT. See *id.*

¹⁴² Other factors will also influence the extent of advertising's influence. First, the greater the proportionate contribution of individual advertisers or organized groups of advertisers to the media enterprise's revenue, the greater their influence. Classified advertising by the public, although very profitable to newspapers, is generally thought to exercise little influence because of its dispersed nature.

Second, all elements of a conglomerate may be subject to influence if any element of the conglomerate is. If the conglomerate owns different media enterprises of different types, advertisers may leverage influence over one type of media into influence over another. After the *New York Times*, which seldom carries medical advertising, ran a series of articles on medical malpractice that antagonized pharmaceutical firms, these firms threatened to withdraw 260 pages of ads from a medical magazine owned by the *Times*. Rather than buckle, the *Times* sold the magazine. See BAGDIKIAN, *supra* note 18, at 162-63. This response, however, is not likely to be the norm. In a 1968 incident, people in the advertising field became upset after their trade journals received advance copies of a book critical of the advertising industry. An editorial in *Advertising Age* called the author an "ungrateful dog." Confronted with this reaction just one month before the scheduled publication, *Reader's Digest* ordered the publisher, a subsidiary, to cancel the book as contrary

presumably have much less influence on the content of books, where they provide virtually none of the revenue, than on broadcasting, where they provide virtually all. Newspapers should be somewhere in between, both in the portion of revenue advertisers provide and the extent of advertiser's influence. The officers of the Australian company that purchased *Ms.* in 1987 were reportedly "shocked" at the extent of advertiser control in the United States, but then noted that "[Australian] readers pay two times more for their magazines . . . so advertisers have less power to threaten a magazine's viability."¹⁴³

Third, the very newsworthiness of advertising's influence on media content, for example, the newsworthiness of the examples discussed below, may indicate the rarity of the influence. Nevertheless, another interpretation is more plausible. Given that exposure of advertiser influence is damaging to media interests, the media

to the best interests of *Reader's Digest*. See *Pleasantville's Velvet Trap*, PUBLISHER'S WKLY., June 17, 1968, at 49. Similarly, "[i]n 1974, Time's Fortune Book Club . . . broke its contract and dropped . . . [its plan to distribute Gerard Zilg's *Dupont: Behind the Nylon Curtain*] after Dupont threatened to withdraw its ads from Time publications." LEE & SOLOMON, *supra* note 139, at 75.

Third, the nature of the media's product may affect the amount of influence that media producers and consumers will find acceptable—and hence the "cost" to the media of allowing the influence or, at least, the cost of allowing public knowledge of it. Many people will be less disturbed that a company pays to have a character in an entertainment program drink a coke or smoke a Marlboro than if the company pays for a favorable news "report" about the company's products.

Fourth, professionalism sometimes leads media producers to resist advertisers' intrusions. When the publisher of *Look* decided against publishing Gloria Steinem's interview with Cesar Chavez because of fear about its effect on Sunkist's advertising, the managing editor, Patricia Carbine, threatened to resign. Her threat was effective—the story ran. See Gloria Steinem, *Sex, Lies & Advertising*, *Ms.*, July/Aug. 1990, at 18, 19-20. Context and tradition may affect the strength and power of this sense of professionalism.

Fifth, accepted industry practices and prejudices can affect the degree of influence that advertisers demand and that the media permits—although this merely pushes back the question of why these practices and prejudices developed as they did. In the first issue of the new, advertising-free *Ms.*, Steinem reports that the original *Ms.* faced an accepted industry-wide view that advertisers had a special right to dominate, and had a tradition of dominating, the content of "women's" magazines in a way that they did not have for other magazines. See *id.* at 18-19, 25-26.

Sixth, media consumers may identify advertisers more with the content surrounding their ad in some contexts than in others. This identification of the advertiser with the content would increase the advertisers' incentive to control that content. Stephen Seabolt, advertising sales director at *Time*, reported that he was told by a client "that TV spots often are perceived as program sponsorships, but magazine ads aren't since a consumer pays for a magazine." Wayne Walley, *War Bleeds Nets of Millions a Day*, ADVERTISING AGE, Jan. 21, 1991, at 1, 54.

¹⁴³ See Steinem, *supra* note 142, at 25.

will work to avoid public exposure. More importantly, *even if* active advertiser intervention is relatively rare, most observers conclude that advertisers' concerns result in extensive media "self-censorship," sometimes even unconscious censorship reflecting ingrained knowledge of the boundaries of what is permissible.¹⁴⁴ Knowledge of occasional advertiser retaliations for violations of their interests, even if the media sturdily resisted the influence in the particular publicized example, creates a pervasive awareness that deviation can be costly.

For example, Les Brown reports that NBC stood-up to Coca-Cola in 1970 when Coke forcefully pressured NBC to change a documentary, *Migrant*, which showed Coke as one of the perpetrators of offensive treatment of laborers in the Florida citrus industry. After the uncensored broadcast, the President of Coca-Cola, Inc., J. Paul Austin, admitted before a Congressional committee that the broadcast had accurately depicted the housing and working conditions and that Coke would promptly set out to change the situation—quick results of good journalism. A second result, however, was that NBC lost all its network billings from Coke, amounting to several million dollars.¹⁴⁵ When Brown's story was reprinted eight years later, the introduction observed an additional result: "NBC ha[d] not . . . produced a documentary on a controversial domestic issue involving an important advertiser since"¹⁴⁶

¹⁴⁴ See, e.g., BAGDIKIAN, *supra* note 18, at 45, 155; HERTSGAARD, *supra* note 95, at 87-90; LEE & SOLOMON, *supra* note 139, at 98-99. In a survey of top editors of popular consumer magazines, 49% of the editors reported that they had complete independence from the business office. See Vicki Hesterman, *Consumer Magazines and Ethical Guidelines*, 2 J. MASS MEDIA ETHICS 93, 96 (1987). A possible reaction is to be disturbed that only 49% felt unconstrained—giving some support to Chris Welles's claim that "anyone who has been in the business for more than a few months can cite plenty of examples of editorial compromises due to pressure, real or imagined, from publishers, owners and advertisers." LEE & SOLOMON, *supra* note 139, at 98 (quoting Chris Welles, former journalist and now instructor at the Columbia School of Journalism). Equally interesting is another survey result that, before buying a "well-written story detailing the dangers of a product advertised in the magazine," 55% of these editors reported they would consult their business office and another 24% reported that they would buy the story but warn the business office. See Hesterman, *supra*, at 96. In other words, many editors who feel that they have complete independence still consciously work with the business office in relation to their editorial choices.

¹⁴⁵ See LES BROWN, *TELEVISION: THE BUSINESS BEHIND THE BOX* 196-203 (1971). Brown observed that "[g]ood documentaries were bad business for broadcast companies that had allowed themselves to become extensions of the advertising industry." *Id.* at 197.

¹⁴⁶ Les Brown, *Sponsors and Documentaries*, in *THE COMMERCIAL CONNECTION* 265

Erik Barnouw, discussing network documentaries, made an observation that applies more broadly: "The most formidable impediment is not censorship, but self-censorship. Its monuments are proposals not budgeted, ideas never proposed."¹⁴⁷ Attribution of control to advertisers may be accurate even if difficult to demonstrate unequivocally. If this self-censorship is the more pervasive problem, as I think it is, the anecdotal accounts of advertiser interventions are best read as illustrative of much more deeply entrenched problems.

Mechanisms of advertisers' control of media content must be expected to operate in a manner that discourages consciousness of what would be seen as improper censorship. One likely method involves hiring and advancement decisions within the media organization. Concern with one's career can operate powerfully at all levels of the psyche, teaching the bounds of the acceptable and unacceptable. Those employees who require too much overt direction are not likely to be advanced. Although referring to censorship by owners rather than advertisers, Parenti argues that "*anticipation* that superiors might disapprove of this or that story is usually enough to discourage a reporter from writing it, or an editor from assigning it."¹⁴⁸ Eventually, this system of predicted disapproval dissuades reporters or producers from even thinking about a problematic story. Having learned "not [to] cross any forbidden lines, [journalists] are not reined in. So they are likely to have no awareness they are on an ideological leash."¹⁴⁹ As C. Terence Clyne, the vice-president of a large advertising agency, noted in 1959 testimony before the FCC: "[T]here have been very few cases where it has been necessary to exercise a veto, because the producers involved and the writers involved are normally pretty well aware of what might not be acceptable."¹⁵⁰

The hidden control system is not perfect. Sometimes awareness of the leashes still exists. In 1972, David Rintels, chairman of the Committee on Censorship of the Writers Guild of America, West, reported that of those members of the Writers Guild who responded to a poll, 86% reported from personal experience that censorship

(John W. Wright ed., 1979).

¹⁴⁷ BARNOUW, *supra* note 141, at 137.

¹⁴⁸ PARENTI, *supra* note 132, at 36.

¹⁴⁹ *Id.* at 35.

¹⁵⁰ BARNOUW, *supra* note 141, at 54. Barnouw notes that this view was "expressed again and again." *Id.*

exists on TV, 81% believed that "television is presenting a distorted picture of what is happening in this country"; only 8% believed that "current television programming is 'in the public interest.'"¹⁵¹ As Frank Stanton explained in 1960, "[s]ince we are advertiser-supported we must take into account the general objectives and desires of advertisers as a whole."¹⁵²

A. Avoiding Offense to Advertisers: A Kept-Press

Advertisers would prefer that the media avoid, bury, or downplay media content that casts their products, firm, or industry in a negative light and that the media instead present content supportive of their interests and their products. The most direct route to this result is to pay to have apparently non-advertising content conform to these desires.

This practice was common in newspapers all over the country during the late nineteenth and early twentieth centuries.¹⁵³ Generally referred to as "reading notices," these insertions were printed as news stories or editorials with no markings or placements identifying them as advertising. The practice blatantly undermined the integrity of journalism. In New York City, such "reading notices" were published at one time or another in William Randolph Hearst's *Journal*, the *New York Tribune*, the *New York Post*, the *New York World*, and the *New York Times*.¹⁵⁴ Advertisers wrote reading notices to promote their products or interests, often disguising the advertisement by focusing on prominent people and other unrelated information, and then mixing in plugs and "news" about the advertiser's patent medicine, railroad, real estate, or other products and services.

¹⁵¹ JAMES ARONSON, DEADLINE FOR THE MEDIA 144-45 (1972).

¹⁵² BARNOUW, *supra* note 141, at 57.

¹⁵³ See Linda Lawson, *Advertisements Masquerading as News in Turn-of-the-Century American Periodicals*, 5 AM. JOURNALISM 81 (1988).

Technically, "reading notices" could be viewed as merely a form of advertising, not of advertisers influencing the non-advertising content, and, thus, not relevant to the theme of this Article. For two reasons, however, I consider reading notices relevant. First, from the perspective of the public, which receives these messages as if they were editorial content, reading notices epitomize advertisers' control over non-advertising content. Second, they represent merely a more overt example of the more informal, but money-backed means that advertisers more frequently use today to exercise influence. They illustrate the blurriness of the line separating advertisements from advertiser-influenced news.

¹⁵⁴ See *id.* at 85.

Reading notices were used to manipulate public policy as well as product purchases. Beginning just after 1900, both large and small companies, including Standard Oil, Armour & Company, and Prudential Insurance, paid newspapers to include apparent news items and editorials designed to influence legislation and to advance their political agendas. These corporate "advertisers" required that these insertions be indistinguishable from the newspaper's normal news and editorial content.¹⁵⁵

Over time this practice received increasing criticism, but was also defended by some in the industry. In an 1890 issue of *Printers' Ink*, the *St. Paul Globe* "asserted that reading notices were perfectly legitimate—and successful."¹⁵⁶ Within the newspaper industry opposition to the practice was often couched in commercial as well as ethical terms. Since readers do not have personal access to the events of the world or to a range of views about their society, they may value newspapers, like they value the disinterested judgments of physicians and lawyers, for providing content that represents editors' and journalists' professional judgments as to the information and opinion about which the reader should know. To the extent that reading notices undermined the basis of this value, newspapers could be short-sighted in publishing this "tainted" news.¹⁵⁷ Thus, E.W. Scripps concluded that it made "good business sense" to avoid publication of unlabeled reading notices.¹⁵⁸ Similarly, the editor of the *Boston Post* publicized its refusal to print a street railway's reading notice, implicitly concluding that public knowledge of its refusal would improve its reputation and, thereby, increase its value.¹⁵⁹

¹⁵⁵ See William Kittle, *The Making of Public Opinion*, 41 ARENA 433, 440-43 (1909); Lawson, *supra* note 153, at 86-90.

¹⁵⁶ Lawson, *supra* note 153, at 86.

¹⁵⁷ These arguments are equally current today. Some in the industry, believing that weak, distorted real estate coverage loses readers and, hence advertisers, conclude that the common practice of assigning responsibility for the paper's real estate section to the newspaper's advertising department is economically short-sighted, "especially in more sophisticated markets." When the *Miami Herald* gave the real estate section to the news department after twenty years of publishing the section as an advertorial, ad lineage from real estate firms jumped 46% as the better coverage produced better readers which "translated into more business for the local real estate industry." Elizabeth Lesly, *Demand Happy News . . . and Often Get It*, WASH. JOURNALISM REV., Nov. 1991, at 21, 23.

¹⁵⁸ See Lawson, *supra* note 153, at 93; see also *infra* note 175.

¹⁵⁹ See Lawson, *supra* note 153, at 93-94.

Reading notices were increasingly criticized and declined in number during the Progressive era—although some advertising handbooks still promoted use of reading notices as late as 1911.¹⁶⁰ Finally, in 1912, “all editorial or other reading matter . . . [for] which money or other valuable consideration is paid” were prohibited by the Post Office Appropriation Act in any publication using the second-class postal privilege unless plainly marked “advertisement”.¹⁶¹

Given publications’ reliance on the mails, the 1912 Act effectively outlawed routine *direct* payments for control of the news. However, that legislation hardly eliminated advertisers’ control over mass media content. Arguably, the most deadly case of advertiser influence has been mass media’s virtual silence about the dangers of cigarette smoking long after these effects were well known among medical researchers.¹⁶² Of course, some silence may reflect what we have learned counts as “news”—a much deeper problem. Imagine the comparative chances of two stories becoming a front-page headline: “Plane Crash In Arizona Kills 78 Today” or “Hospitals Around The Country Report 822 People Died From Cigarettes Today.” The media’s silence stands out, however, when contrasted to the media’s extensive coverage of most suspected causes of cancer or other health problems.¹⁶³

¹⁶⁰ See *id.* at 95 (footnote omitted).

¹⁶¹ Post Office Appropriation Act, ch. 389, § 2, 37 Stat. 553, 554 (1912); see *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 316 (1913) (upholding Act against a First Amendment challenge). Second class mailing privileges were a major subsidy for newspapers and magazines; letter mail, for example, was subjected to a rate eighty times higher than a second-class newspaper. See *Lewis*, 229 U.S. at 304.

Interestingly, from the beginning of second-class mailing privileges, the government recognized the public policy relevance of subsidizing newspapers desired by readers who were willing to pay for them, as opposed to papers principally devoted to advertising. Thus, a 1879 statute limited second-class privileges to papers “having a legitimate list of subscribers . . . [and did not grant the privilege to] regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.” *Id.* at 305 (quoting Act of Mar. 3, 1879, ch. 180, § 14, 20 Stat. 355, 359).

¹⁶² The public is still woefully ignorant—“half the general and two thirds the smoking population [do] not think smoking makes ‘a great deal of difference’ in life expectancy.” William L. Weis & Chauncey Burke, *Media Content and Tobacco Advertising*, 36 J. COMM. 59, 64 (1986). And ignorance affects behavior. Smoking rapidly declined during the two periods that the government either required or sponsored anti-smoking ads or information campaigns. See *id.* at 66.

¹⁶³ Unless otherwise noted, information in this discussion of tobacco advertising is taken from BAGDIKIAN, *supra* note 18, at 168-73. Bagdikian finds the dangers of tobacco were clear and a matter of publicly available knowledge by 1936, although he notes that research in England had earlier pointed to the dangerousness of smoking.

Despite 300,000 deaths a year attributable to smoking and evidence of the harmful effects of smoking tobacco that has been clear at least since the 1930s, evidence which led the American Medical Association to ban tobacco advertising in its journals since 1953, reports on the dangers of smoking have been virtually absent in those media in which tobacco companies advertise.¹⁶⁴ The reason is not hard to fathom: "[T]he tobacco industry spends \$4 a year for every American man, woman, or child" on advertising, or over \$1000 since 1954 per smoking-related death, making tobacco the most heavily advertised product in the country. An editor of the *New Republic*, which deleted a commissioned article criticizing tobacco companies after the article was already typeset, defended the magazine on the ground that the deletion was unusual, and occurred only "because of the relative size of the [advertising] account."¹⁶⁵ *Cosmopolitan* and *Psychology Today* explained their

See id. at 168-69. However, a critical exposé of newspapers' suppression of information about the health dangers of cigarettes had already been offered in 1935. *See* GEORGE SELDES, *FREEDOM OF THE PRESS* 50-51 (1935).

George Selde describes numerous cases of advertisers' influencing editorial content in order to advance either product sales or the advertiser's own political agenda. *See id.* at 42-61. In one example, he argues that the need to please advertisers caused most of the press to oppose the food and drug law of 1906, and that the overt influence of patent medicine advertisers over newspapers' editorial positions has been constant throughout the century. *See id.* at 62-66. *But cf.* GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM* 108-10 (1963) (claiming that support for pure food legislation was overwhelming within the food industry with the exception of the patent medicine and whiskey interests).

Despite popular histories that attribute the meat inspection act of 1906 to muckraking exposes, especially Upton Sinclair's *The Jungle*, Kolko shows that "the Federal inspection of meat was, historically, established at the packers' request." *Id.* at 103 (quoting Upton Sinclair). The large meat packers had been pushing for, and getting, increasingly strict inspection standards since the 1880s, initially to avoid having their meat excluded from the European market. Both this concern and a desire to prevent small, legally unregulated packers from gaining a competitive advantage over these large packing operations motivated later extensions of the legislation. *See id.* at 98-108.

¹⁶⁴ *See, e.g.,* R.C. Smith, *The Magazines' Smoking Habit*, 16 COLUM. JOURNALISM REV. 29, 31 (1978) (noting that over the previous seven years, magazines that accepted cigarette advertising published no articles giving readers clear information on the dangers of smoking).

In 1983 *Newsweek* published a health supplement written by the American Medical Association; in 1984 *Time* published one basically written by the American Academy of Family Physicians. To the outrage or embarrassment of the authors, each magazine either deleted or resisted any mention of adverse effects of smoking, except to warn against smoking in bed. *See* Weis & Burke, *supra* note 162, at 61-62.

¹⁶⁵ Weis & Burke, *supra* note 162, at 63.

refusal to take advertising for a stop-smoking clinic on the ground that it would offend their tobacco advertisers.¹⁶⁶

Clearly, the tobacco industry does not like criticism of their product. When a company tried to market a substitute for cigarettes, it was told by a major magazine that its product was "unacceptable."¹⁶⁷ When *Reader's Digest*, one of the few magazines which refuses cigarette ads, ran an article on the medical dangers of smoking, its advertising agency deserted it.¹⁶⁸ In 1980, when *Mother Jones* ran an article linking tobacco to health dangers, the tobacco companies canceled their ads.¹⁶⁹ Unfortunately, such cancellations are usually unnecessary—the media knows what behavior is expected and has complied.

The tobacco industry's use of advertising to "purchase" media silence is merely a slightly more subtle version of the turn of the century practices of the patent medicine industry.¹⁷⁰ At that time, patent medicine manufacturers were one of the country's largest advertisers. The medicines, which contained as much as 80% alcohol and often cocaine and morphine, were usually medically worthless. Often the "medicines destroyed health, and made drunkards and dope addicts out of their users."¹⁷¹ The medicine dealers had standard advertising contracts with thousands of newspapers throughout the country. These contracts provided that the advertiser could cancel the contract from the date of enactment of any law harmful to its interests. When legislatures considered bills harmful to the patent medicine industry, newspaper editors, after receiving letters from the patent medicine producers that merely referred to the contract language, uniformly printed articles or editorials favoring the industry. Thus, an association of patent medicine producers gratefully attributed its consistent legislative successes to aid from the American Newspaper Association and from individual papers.¹⁷² Even more directly related to control-

¹⁶⁶ See *id.*

¹⁶⁷ Cf. BAGDIKIAN, *supra* note 18, at 166 (noting that over forty newspapers and magazines refused ads by Car/Puter International, which offers computer printouts of list and dealers' prices for cars; one publisher explained that the major problem with the ad was its competitiveness with automobile dealers).

¹⁶⁸ See *id.* at 171.

¹⁶⁹ See *id.*

¹⁷⁰ See Mark Sullivan, *The Patent Medicine Conspiracy Against Freedom of the Press*, in THE MUCKRAKERS 179-94 (Arthur Weinberg et al., eds., 1961) (reprinting an article originally appearing in COLLIER's, Nov. 4, 1905).

¹⁷¹ *Patent Medicine*, in THE MUCKRAKERS, *supra* note 170 at 176.

¹⁷² See *id.* at 184-87, 189-91.

ling newspaper's editorial policies, the advertising contracts provided for cancellation if any detrimental matter "is permitted to appear in the reading columns or elsewhere in the paper."¹⁷³ The result of this clause was either silence or praise of "proprietary" medicines.¹⁷⁴

Although contractual obligations to promote advertisers' interests may no longer be deemed acceptable, the media has not forgotten that favorable treatment of advertisers is good business. According to Michael Parenti:

Times publisher Arthur Ochs Sulzberger openly admitted that he urged his editors to present the industry position in coverage of safety and auto pollution because, he said, it "would affect the advertising." The auto industry was a major newspaper advertiser, responsible for about 18% of ad revenues in 1973 and 1974.¹⁷⁵

The most powerful response for failure of the media to acquiesce is to withdraw ads. After "60 Minutes" discussed health hazards of Alar, a chemical used on apples, the Washington State Fruit Commission, a trade association, withdrew \$71,300 worth of advertising for cherries from three CBS affiliates in protest.¹⁷⁶ Negative coverage should not be a realistic threat to real estate advertisers—44% of newspaper real estate editors in a national

¹⁷³ *Id.* at 182.

¹⁷⁴ *See id.* at 183.

¹⁷⁵ PARENTI, *supra* note 132, at 48. In contrast, in 1901, Adolph Ochs is quoted, responding to an advertiser who sought to influence the newspaper's policies: "You seem to wish that *The New York Times* should go about as a mendicant, begging for advertising patronage. We will never do anything of the kind." ELMER H. DAVIS, *HISTORY OF THE NEW YORK TIMES, 1851-1921*, at 318 (1921). Davis argues that "no sane man is likely to suppose that [the *New York Times*'s] policies are affected by the wishes of any advertiser," this being a case where "good business and good morals [are] identical." *Id.* at 316, 322.

Parenti reports many other examples of this pro-advertiser orientation, which is by no means new. In an Ohio mill town early in the century, reporter Art Shields was cautioned by the editor/advertising manager "to report nothing the merchants and brewers didn't like. . . . 'Be especially careful when you write about the brewery. . . . It's our best advertiser.'" And in regard to the steel plant, he was told "Better check with management before you write what workers tell you." PARENTI, *supra* note 132, at 49 (quoting ART SHIELDS, *MY SHAPING YEARS* 124 (1982)). Likewise, the *New York World* reportedly rejected O. Henry's "An Unfinished Story" out of fear that it would offend department store owners. *See SELDES, supra* note 163, at 43.

¹⁷⁶ *See Fruit Growers Pull Commercials to Protest Report by CBS on Alar*, N.Y. TIMES, May 7, 1989, at 36; *see also* 2 WORLD PRESS ENCYCLOPEDIA, *supra* note 18, at 986-87 (providing an illustrative list of cases where advertisers withdrew their ads). It is important to remember that withdrawals occur only when the advertisers' implicit censorship has failed to operate effectively.

survey reported that "publishers or senior editors prohibit[ed] [balanced coverage out of] fear of offending advertisers."¹⁷⁷ Still, real estate advertisers took offense. "More than 80% [of these real estate editors] said advertisers had threatened to pull ads because of negative coverage."¹⁷⁸ *Ms.* won awards for its 1980 story on an underground feminist movement in the Soviet Union, but Gloria Steinem reports that its "years of efforts to get an ad schedule from Revlon" were undone "[b]ecause the Soviet women on [the] cover [were] not wearing makeup."¹⁷⁹

Proctor & Gamble publicly announced that it would withdraw all advertising from any TV station that broadcast a "highly offensive" anti-Folgers commercial presented by a political advocacy group, Neighbor-to-Neighbor, and supported by groups such as the National Council of Churches.¹⁸⁰ Narrated by actor Ed Asner, the commercial said: "The murderous civil war in El Salvador has been supported by billions of American tax dollars and by the sale of Salvadoran coffee. . . . Boycott Folgers. What it brews is misery and death."¹⁸¹ Most television stations refused the ad.¹⁸² After WHDH in Boston broadcast the ad, Proctor & Gamble withdrew all its advertising from the station, which had been running about \$1 million a year.¹⁸³

¹⁷⁷ Wendy S. Williams, *Two New Surveys Show The Industry's Reach*, WASH. JOURNALISM REV., Nov. 1991, at 24 (reporting on a confidential survey of 42 real estate editors).

¹⁷⁸ *Id.* Farm publications report similar problems. Of the 190 members of American Agricultural Editors Association responding to survey, 62% reported threats to withdraw advertising because of editorial copy, 48% had had advertising withdrawn, and a quarter reported "direct demands for editorial copy as tradeoff for advertising." Robert G. Hays & Ann E. Reisner, *Feeling the Heat from Advertisers: Farm Magazine Writers and Ethical Pressures*, 67 JOURNALISM Q. 936, 939 (1990).

¹⁷⁹ Steinem, *supra* note 142, at 22-23 (emphasis deleted).

¹⁸⁰ *Brewing Trouble*, THE ECONOMIST, May 26, 1990, at 70.

¹⁸¹ Thomas Palmer, *P & G Will Resume Ads on Channel 7 in '91*, BOSTON GLOBE, Dec. 12, 1990, at 73-74.

¹⁸² The reasons for refusing the ad were unclear. Many stations have a policy against taking issue-oriented advertising, a policy that may in part reflect advertiser-related concerns but also may represent a hold-over from the time when the stations might fear that the advertisements would create "fairness doctrine" obligations. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). However, similar refusals occur in contexts where the fairness doctrine never applied. For example, all four Chicago dailies refused an ad by a union explaining its picketing of Marshall Fields, one of Chicago's largest retail store advertisers. See Hillier Kriehbaum, *The Impact of Advertising Pressure on the Press*, in THE COMMERCIAL CONNECTION: ADVERTISING & THE AMERICAN MASS MEDIA 245, 246 (John W. Wright ed., 1979).

¹⁸³ See Palmer, *supra* note 181, at 73; Thomas Palmer, *WHDH Demands Issue-Ad Accuracy*, BOSTON GLOBE, Dec. 17, 1990, at 26, 27.

WHDH appears to have trouble avoiding advertisers' wrath. It also lost about \$4.5 million annually in automobile dealers' advertising as a result of a series of investigative reports broadcast in May, 1990, concerning questionable practices by car salesmen.¹⁸⁴

Content concerns extend beyond unfavorable coverage. Advertisers would also like "free," affirmative support in the non-advertising space, including promotion of the desires to which their products allegedly respond. Partly in response to this desire, newspapers have created whole sections of the newspaper—focusing on fashions, food, travel, technology, and real estate—in a form that provides a suitable context for placing advertisements. The vice-president of sales and marketing of the *Houston Chronicle*, one of many newspapers in which the advertising department supplies all the "news" for large sections of the paper, explained: "We do nothing controversial. . . . Our only concern is giving editorial support to our ad projects."¹⁸⁵ Bagdikian notes that despite surveys indicating that readers want more hard news, the major trend among newspapers has been toward more "fluff," which is desired by advertisers to support product interest. He reports a prominent editor's warning that "newspapers would eventually sink under the weight of . . . 'Revenue Related Reading Matter.'"¹⁸⁶

Advertisers' concerns also go far beyond their own products. Television's largest advertiser, Proctor & Gamble, stated in a memorandum on broadcast policies: "There will be no material that may give offense, either directly or by inference, to any commercial organization of any sort."¹⁸⁷ Proctor & Gamble's requirements

¹⁸⁴ See Palmer, *supra* note 181, at 74. Proctor & Gamble resumed advertising after WHDH changed its policies on accepting public interest ads and after a report it commissioned (in part to help secure Proctor & Gamble's return) found that the ad improperly singled-out Folgers, although Neighbor-to-Neighbor argued that, to be effective, the boycott needed to be focused. The station's study "did establish, however, that 'there were very substantial links between the El Salvadoran coffee industry and violence and human-rights abuses,'" and that "all major American coffee companies should have been aware of the violence." Palmer, *supra* note 183, at 27. The draft report cites "former US government officials as saying that Salvadoran death squads have received 'continuous financing from the coffee industry since the late 1970s.'" Richard Higgins, *Ch. 7 is Urged to Release Study on Anti-Folgers Ad*, BOSTON GLOBE, Apr. 16, 1991, at 20.

¹⁸⁵ BAGDIKIAN, *supra* note 18, at 166.

¹⁸⁶ *Id.* at 136.

¹⁸⁷ BARNOUW, *supra* note 141, at 112 (quoting memorandum presented by Proctor and Gamble's general advertising manager in 1965 FCC hearings). In the 1930s, Seldes reports Proctor & Gamble canceling their advertising "with all newspapers

were quite detailed: "[C]haracters . . . should reflect recognition and acceptance of the world situation" and "writers should minimize the 'horror' aspects [of war]. . . . Men in uniform shall not be cast as heavy villains or portrayed as engaging in any criminal activity."¹⁸⁸ Its policies specified what would be inappropriate treatment of businessmen as well as "[m]inisters, priests and similar representatives of positive social forces" and required convincing rejoinders to any attack on a "basic conception of the American way of life."¹⁸⁹ Moreover, "no material on any of our programs . . . [should] in any way further the concept of business as cold, ruthless, and lacking all sentiment or spiritual motivation."¹⁹⁰ According to Proctor & Gamble's advertising manager, these policies applied both to entertainment programs and to news and public affairs documentaries.¹⁹¹ And these broad concerns extend to print media. Many advertisers in *Ms.* have very specific directives controlling the editorial content permitted adjacent to their ads. Proctor & Gamble, however, barred its products from *any issue* of the magazine "that included *any* material on gun control, abortion, the occult, cults, or the disparagement of religion."¹⁹²

Advertisers also consider the overall editorial approach of the publication. According to Gloria Steinem, after she reported survey evidence to Leonard Lauder, president of Estee Lauder, to show that readers of *Ms.* are more likely than those of *Cosmopolitan* or

which had used a syndicated article telling women how to make soap cheaply at home." SELDES, *supra* note 163, at 50.

¹⁸⁸ BAGDIKIAN, *supra* note 18, at 156-57 (quoting memoranda presented at 1965 FCC hearings held to determine how much influence advertisers had on noncommercial content of television and radio).

¹⁸⁹ *Id.* at 157.

¹⁹⁰ *Id.*

¹⁹¹ See *id.* (summarizing testimony of Albert Halverstadt, general advertising manager of Proctor & Gamble).

¹⁹² Steinem, *supra* note 142, at 26. Proctor & Gamble's concern with the occult may be understandable. During the 1980s, P & G faced constant rumors that the company supported the Church of Satan, and that its trademark, a moon and thirteen stars (which purportedly represent the thirteen original states that make up the United States) was a Satanic symbol. At times during 1982, it was receiving 15,000 queries a month concerning its relationship to the Devil. Although it spent hundreds of thousands of dollars combating the rumors and brought suit against some of those involved, a serious outbreak of rumors re-occurred in 1985, leading the company to announce that it would remove its logo from its products. See Sandra Salmans, *P. & G. Drops Logo; Cites Satan Rumors*, N.Y. TIMES, Apr. 25, 1985, at D1; see also Lisa Belkin, *Proctor & Gamble Fights Satan Story*, N.Y. TIMES, Apr. 18, 1985, at C3 (reporting that court awarded \$75,000 in damages and required counter speech from two Amway distributors who had spread rumor and urged boycott).

Vogue to use his products, Lauder responded that "Ms. isn't appropriate for his ads" because "Estee Lauder is selling 'a kept-woman mentality.'"¹⁹³

The examples described above and, even more, routine pro-advertiser practices and the policies that they encourage among publishers, suggest that advertisers are buying a "kept" mentality in relation to the press. Of course, this does not deny that much about freedom of the press as experienced in this country is valuable—important information is often developed and usually published. Published reports of the dangers of smoking have been available throughout the century. But advertising has prevented this information from being readily available to most people until long after it was widely accepted among medical researchers. Anything preventing the press from effectively providing information and commentary that the public would want or that an "independent" press would conclude the public needs, is a serious threat to sound social policy and a properly functioning democracy. Advertising operates as a social control mechanism that is often more effective than government censorship in limiting press freedom.

B. *A Buying Mood: The Proper Surroundings for Ads*

Advertisers want more than editorial content supportive of their products. They also want the surrounding content to promote a frame of mind that leaves readers or viewers most open to advertising messages.¹⁹⁴ Thus, Du Pont "told the FCC that the corporation finds its commercials more effective on 'lighter, happier' programs."¹⁹⁵ An ABC-TV vice-president for programming indicated that shows should "attract mass audiences without unduly offending these audiences or too deeply moving them emotionally [because, it is thought, this would] . . . interfere with their ability to receive, recall, and respond to the commercial messages."¹⁹⁶ For instance,

¹⁹³ Steinem, *supra* note 142, at 24.

¹⁹⁴ Advertisers' practices reflect research findings that are more cautiously stated. A review of the research literature indicates that "[i]n general, mood states seem to bias evaluations and judgments in mood congruent directions." Meryl P. Gardner, *Mood States and Consumer Behavior: A Critical Review*, 12 J. OF CONSUMER RES. 281, 287 (1985). It found that "[a]lthough context-induced moods may significantly affect consumer response to advertising, there is a dearth of evidence supporting this claim." *Id.* at 296. It suggested that "there may be a general advantage to placing advertisements in contexts which induce positive moods." *Id.* at 294.

¹⁹⁵ BAGDIKIAN, *supra* note 18, at 160 (citation omitted).

¹⁹⁶ BOB SHANKS, *THE COOL FIRE: HOW TO MAKE IT IN TELEVISION* 98 (1976).

"advertising agencies were reluctant to recommend to their clients the 1980 CBS movie *Fania Fenelon*, about an Auschwitz survivor, because of the movie's 'utterly depressing nature.'"¹⁹⁷ Chrysler explained that it withdrew advertising from ABC's mini-series *Amerika* because "our upbeat product commercials would be both inappropriate and of diminished effectiveness in that environment."¹⁹⁸

To the extent that the media responds to this concern with packaging, it is guided by neither what the viewers want nor what media professionals think the public needs. Instead, advertisers pay the media to provide content the advertiser believes will leave that audience emotionally and intellectually most vulnerable to commercial messages.¹⁹⁹ Eric Barnouw describes how critically acclaimed anthology television series, despite large audiences, "virtually passed out of existence" beginning in 1955 because sponsors were resistive. These programs had social implications, and their complexity made the simplicity of product commercial solutions seem frivolous or fraudulent. Moreover, characters were often too lower class, and "commercials looked out of place in Bronx settings."²⁰⁰ In contrast the newer episodic series rely on formula scripts, with the formula providing a control mechanism, taking much of the initiative away from writers who previously could

Shanks continues, noting: "This programming reality is the unwritten, unspoken *gemeinschaft* among all professional members of the television fraternity." *Id.* And although many react with indignation to this reality, Shanks argues that any complaints should be directed not at the advertisers but at the "complex system"; that only structural changes, some of which he recommends, would modify this situation. *See id.* at 98-99.

¹⁹⁷ Marvin E. Goldberg & Gerald J. Gorn, *Happy and Sad TV Programs: How They Affect Reactions to Commercials*, 14 J. CONSUMER RES. 387, 401 (1987) (citation omitted).

¹⁹⁸ *Id.* (citation omitted).

¹⁹⁹ A "buying mood" is what is created for children when they grow up. For the child, the equivalent of a "buying mood" is "program length commercials"—where the sponsor's product is the star of the entire show. Before stopped by fierce industry opposition, the FTC proposed to prohibit, as inherently "deceptive," all television advertising directed at very young children and to regulate a variety of other commercial practices such as program length commercials aimed at somewhat older children. *See* Dale Kunkel & Bruce Watkins, *Evolution of Children's Television Regulatory Policy*, 31 J. BROADCASTING & ELECTRONIC MEDIA 367, 376-78 (1987). Equally objectionable from a policy perspective, the economic advantages of these programs push "legitimate" children's programs off the air. *See* Dale Kunkel, *From a Raised Eyebrow to a Turned Back: The FCC and Children's Product-Related Programming*, 38 J. COMM. 90, 102-03 (1988); Patrick J. Sheridan, *FCC Sets Children's Ad Limits*, 119 BROADCASTING 33 (Nov. 12, 1990).

²⁰⁰ BARNOUW, *supra* note 141, at 106-07.

produce "policy crises," and allowing the advertiser to maintain confidence that programs consistently provide the right buying mood.²⁰¹

It would be comforting to assume that the need to support a buying mood, even if it influences entertainment, does not control the content of the news itself.²⁰² Of course, minor incursions are obvious. It does not take much thought to understand why news programs end with an ironic comment, accompanied by an endearing smile from the newscaster. Likewise, Edward Epstein reported that CBS's decision generally to devote the last five minutes of its news program to "back-of-the-book" material reflected a compromise with network sales executives who sought a concluding "sports package" in order to satisfy an auto manufacturer's desire to advertise in a sports or soft news segment.²⁰³

More disturbingly, America's recent war with Iraq produced unusually explicit indications of advertisers' impact on news content. Beginning with the intensive coverage of the aerial bombing of Iraq, many companies decided to avoid advertising during war programming.²⁰⁴ One advertising executive explained about ads during war news: "I just think it's wasted money. . . . Commercials need to be seen in the right environment. A war is

²⁰¹ See *id.* at 106-08. Barnouw argues that these new "assembly-line" series are also advantageous because they are more exportable. Their de-emphasis on dialogue in favor of action minimizes translation problems and their simple "good-vs.-evil plots [can] be understood anywhere." *Id.* at 108.

²⁰² A vice-president of Coca-Cola stated: "It's a Coca-Cola corporate policy not to advertise on TV news because there's going to be some bad news in there and Coke is an upbeat, fun product." Goldberg & Gorn, *supra* note 197, at 401 (quoting ADVERTISING AGE, Jan. 28, 1980, at 39).

²⁰³ See EDWARD J. EPSTEIN, NEWS FROM NOWHERE: TELEVISION AND THE NEWS 121 (1973); see also *id.* at 78-130 (describing a large number of ways that general economic considerations influenced news programming content). Advertising dollars, independent of either audience preferences or journalistic judgements, influence the crucial decision of whether to present news or entertainment programming, as Fred Friendly dramatically underlined by resigning in response to CBS's decision to show reruns of *I Love Lucy* rather than a live telecast of the Senate's Vietnam War hearings. See FRED W. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL 212-65 (1967). Telling the story somewhat less sympathetically to Friendly, Epstein notes that CBS had already given Friendly greater leeway to broadcast the hearings live than had occurred at other networks. Epstein presents the disturbing view that the rules that Friendly was challenging normally control programming and production decisions concerning network news—rules Friendly had previously accepted. See EPSTEIN, *supra*, at 117-23.

²⁰⁴ See Bill Carter, *Few Sponsors for TV War News*, N.Y. TIMES, Feb. 7, 1991, at D1.

just not an upbeat environment."²⁰⁵ This advertising pullout produced serious financial problems at each network.²⁰⁶

CBS executives admitted that the advertisers' response would affect programming decisions. Even though its war specials all received higher ratings than other channels' entertainment shows, thereby indicating that viewers wanted this broadcasting, the low ad sales on war programming "[made] them economically unfeasible for the network."²⁰⁷ As a result, fewer prime time war specials were shown. The CBS executive explained that "[i]n fairness to our shareholders" they could not afford the million dollar plus loss that results from each prime-time news special on the war.²⁰⁸ Most troubling, however, is the possibility that pandering to advertisers' concerns will distort news content. Since advertisers demand upbeat surroundings for their ads, CBS offered to tailor war specials "to provide better lead-ins to commercials . . . [and] to insert the commercials after segments that were specially produced with upbeat images or messages about the war, like patriotic views from the home front."²⁰⁹

C. *The Need to Avoid Offending Anyone*

Advertisers often avoid controversial content or, more specifically, avoid content that offends or takes a position on a controversial issue. There are mutually reinforcing explanations for this avoidance.

First, controversial material may provoke critical thought believed to be inconsistent with a "buying mood."²¹⁰ Second, because advertisers' economic interests are advanced by dominant values and since controversy normally exists when these values are challenged, controversial content often will be contrary to advertisers' interests.²¹¹ Third, partisan material may lose a

²⁰⁵ *Id.* at D20 (quoting Richard Dale, an executive at Deutsch Advertising).

²⁰⁶ *See id.* at D1. In contrast, CNN, with its extensive coverage of Baghdad during the first weeks of the war, which greatly increased its viewership, raised its advertising rates more than five fold and apparently did not experience the networks' problems with sponsors. *See* Bill Carter, *CNN Sees Its Concept Paying Off*, N.Y. TIMES, Feb. 11, 1991, at D8.

²⁰⁷ Carter, *supra* note 204, at D1.

²⁰⁸ *Id.* at D20 (quoting a CBS executive).

²⁰⁹ *Id.* Apparently, however, CBS's offer was not successful in attracting advertisers. *See id.*

²¹⁰ *See, e.g.,* BARNOUW, *supra* note 141, at 106 (noting that the popular and critically acclaimed anthology programs of the 1950s "made sponsors restive").

²¹¹ *See, e.g., id.* at 120-21 (describing how the sponsors' need for non-controversial

portion of the audience that the media enterprise wants to capture in order to "sell" a larger audience to the advertiser. Fourth, and differing from the objective of attracting the largest possible audience, is the desire not to offend any potential customer. This is a major concern for advertisers. Given that the evidence concerning the effectiveness of advertising in attracting customers is speculative,²¹² the last thing advertisers want is for their advertising to drive customers away. A tasteful treatment of an emotionally charged subject or a balanced treatment of a truly controversial subject is risky.²¹³ But if done carefully, controversial programming, which often attracts large audiences, can be commercially successful. The problem for the broadcaster is not controversy per se, but rather the danger of offending even a relatively small element of the targeted audience.²¹⁴

"entertainment" led to the proliferation of spy dramas in the 1960s).

²¹² See generally SCHUDSON, *supra* note 12, at 90-106 (explaining that because consumers understand advertising as propaganda, they are less attentive to it).

²¹³ Network insistence led Norman Lear to modify a "Maude" episode portraying a character's decision to have an abortion. Lear added a character supporting an anti-choice position. Although the episode gained a "hefty" 41% share of the prime-time audience when it first aired, no commercials appeared in the summer rerun of this episode although commercial slots on other re-run episodes were sold out. See KATHRYN C. MONTGOMERY, TARGET: PRIME TIME: ADVOCACY GROUPS AND THE STRUGGLE OVER ENTERTAINMENT TELEVISION 32, 46-47 (1989); Jay Sharbutt, *NBC Chief Urges Advertisers to Support "Roe,"* L.A. TIMES, May 11, 1989, § 6, at 1.

²¹⁴ Possibly to rise above the commercial clutter, a few advertisers contradict the norm by seeking carefully crafted controversy. Leaving its products entirely out of its ads, Benetton's ads present startling photos—a black person and white person handcuffed together; colorful, unfolded condoms; a nun and priest kissing; a car fire-bombed by terrorists; a Christ-like image of a young man dying of AIDS. Peter Fressola, Benetton's North American director of communications, says that rather than using Benetton's \$80 million ad budget to "show pretty girls in sweaters," the company's objective is "to create dialogue"—and that they try to draw attention to important social issues. Genevieve Buck, *Is This Advertising or Is It a Mission? Only Benetton Knows For Sure*, CHI. TRIB., Feb. 19, 1992, Style sec., at 10. The company's president, Luciano Benetton, asserts that the company is "looking for new ways to communicate." Kim Foltz, *Igniting Debates Through Ads*, N.Y. TIMES, Feb. 23, 1992, § 3, at 6. Putting aside the important question of whether Benetton is encouraging social discourse or corrupting it to make a buck, see Paula Span, *Colored With Controversy; Outcry Over Benetton Ad Showing AIDS Deathbed Scene*, WASH. POST, Feb. 13, 1992 at D1, these ads show the need to narrow the general claim that advertisers avoid controversy. Nevertheless, it is not clear that Benetton's ads take a partisan position likely to offend any significant number of its targeted customers. Fressola claims that "[w]e're not telling people what to think about them. We're saying, 'Here they are, draw your own conclusions; we think these are serious issues.'" *Id.* at D9. Moreover, he observes that the ads promote "brand awareness, name recognition, that sort of thing," *id.*, and says the ad campaign "creates a certain energy and identity for the company that will appeal to a youthful consumer that is our target

Advertisers' desire to avoid offending anyone may directly affect the media's construction of news as well as entertainment. As noted in Part I, the concern to maximize advertising revenue arguably contributed to the development of objectivity as the ruling ideology in journalism.²¹⁵ Bagdikian explains:

As mass advertising grew, the liberal and radical ideas—in editorials, in selection of news, and in investigative initiatives—became a problem. If a paper wished to attract maximum advertising, its explicit politics might create a disadvantage. To obtain more advertising it needed readers of all political persuasions. . . . The answer in the news was a technique called "objectivity." . . . The doctrine of objectivity . . . has given American standard news a profoundly establishmentarian cast²¹⁶

This leads directly to the question of the impact of "objectivity" in journalism on our understanding of the world and on the nature of the political order—questions, briefly touched in Part I, that I put aside here.

The advertisers' fear of offending potential customers leaves the media disproportionately subject to consumer boycotts directed at suppressing material offensive to some organized group.²¹⁷ Actual and threatened boycotts of advertisers as a means to curtail controversial programming have a long history. Threatened boycotts of advertisers during the McCarthy period helped keep programs with "politically suspect" performers off the air.²¹⁸ This tactic has recently been used by groups such as the Moral Majority and Donald Wildmon's Coalition of Christian Leaders for Responsible Television. After Wildmon's organization initiated boycotts of

audience." William Kissel, *Sending Out Shock Waves: More Clothing Companies are Using Social Commentary and Jarring Images to Peddle Their Products*, L.A. TIMES, Aug. 30, 1991, at E1, E4.

²¹⁵ See *supra* text accompanying notes 103-09.

²¹⁶ BAGDIKIAN, *supra* note 18, at 129-30.

²¹⁷ See MONTGOMERY, *supra* note 213. Montgomery's final assessment is that, both in the past and future, "[v]ariations in program offerings will be based on the needs of advertisers, [which] is very different from the political and cultural diversity essential to a healthy democracy." *Id.* at 224; see also Patrick M. Fahey, Comment, *Advocacy Group Boycotting of Network Television Advertisers and its Effect on Programming Content*, 140 U. PA. L. REV. 647 (1991) (citing numerous examples and providing an excellent discussion of this issue).

²¹⁸ See BARNOUW, *supra* note 141, at 48. Alcoa is legendary for standing behind Edward R. Murrow during his programs on the "See It Now" series which dealt with McCarthy and McCarthyism. Alcoa President Irving Wilson presumably wished to comfort Murrow when he said: "I wouldn't ask you not to do such programs, but I would hope you wouldn't do them every week." *Id.* at 51.

Pepsi, the company canceled its Madonna ad campaign as demanded.²¹⁹ After a boycott, Clorox stopped advertising on the "objectionable" programs and agreed to avoid future advertising on shows with gratuitous sex and violence.²²⁰ Wildmon explained to his followers that they must "forget writing to the networks. . . . The real clout that churches have is [with] the advertisers, the sponsors."²²¹

Of course, the technique is not the exclusive province of reactionary groups. A CIO boycott of Philco products led the company to drop sponsorship of a right-wing news commentator in 1938.²²² Between 1975 and 1977, the liberal National Citizens Committee for Broadcasting, headed in 1974 by former FCC Commissioner Nicholas Johnson, along with the National Congress of Parents and Teachers, the American Medical Association, and the United Church of Christ, tried to make individual advertisers accountable for program content and applied pressure to discourage them from sponsoring violent programming.²²³

Consumer boycotts, of course, constitute democratic, expressive activity that should be fully protected by the First Amendment.²²⁴ I do not suggest otherwise. Nevertheless, three structural features of boycotts directed at advertisers as a means of influencing media content make them peculiarly disturbing from the perspective of a free and democratic press.

First, boycotts usually try to induce their targets to adopt behavior that the government could have itself mandated. The boycott protected in *NAACP v. Claiborne Hardware Co.*²²⁵ was designed to end racially discriminatory treatment that the government could and should have prohibited. Nestles was boycotted to

²¹⁹ See Don Kowet, *The "Righteous Indignation" of Donald Wildmon*, WASH. TIMES, July 12, 1989, at E1; *Pepsi Cancels Madonna Ad*, N.Y. TIMES, Apr. 5, 1989, at D21.

²²⁰ See Laura Malt, *CLearR-TV Lifts Clorox Ban*, ELECTRONIC MEDIA, Apr. 30, 1990, at 3.

²²¹ MONTGOMERY, *supra* note 213, at 158 (quoting Donald Wildmon).

²²² See BARNOUW, *supra* note 141, at 33.

²²³ See MONTGOMERY, *supra* note 213, at 109-18. Although the campaign had some initial success in reducing television violence (but with a corresponding increase in programs revolving around sex), violent programming returned after the pressure subsided. See *id.* at 118, 120-21.

²²⁴ The power-generating aspect of boycotts may fit only tenuously into traditional marketplace of ideas theories of the First Amendment, but are easily encompassed within a liberty theory. See BAKER, *supra* note 11, at 153-54, 190.

²²⁵ 458 U.S. 886 (1982). The unanimous opinion in *Claiborne Hardware* seems to adopt a liberty perspective, similar to that discussed at *supra* note 224.

pressure it to stop distributing products (infant formula in the third world) that the government presumably could have forbidden it to distribute.²²⁶ Likewise, the government could have required recognition of the farmworkers union and made the United Farmworkers' original boycott against grapes unnecessary,²²⁷ just as it could regulate pesticides to make the more recent boycott unnecessary.²²⁸

Of course, government action cannot substitute for boycotts. The politically creative activity of boycotting is itself both educational and self-defining expression. The persistent danger that the government will not act properly also requires that the public retain this power. Nevertheless, most boycotts aim at goals that the government could have mandated. Such boycotts are less troublesome than those attempting to force people to do (or not do) that which the government could not require—for example, boycotts designed to control or prevent expression.²²⁹ Picketing in front of a movie theater that is showing offensive, possibly “adult,” films is an attempt to stop communications.²³⁰ When behavior is constitutionally protected from government control because it represents important aspects of freedom, it is arguably anomalous to have private groups, such as the boycotters, controlling this behavior. Put more jurisprudentially, if the constitutional “public/private” line was erased, a boycott aimed at the media in an attempt

²²⁶ See *Nestle's Costly Accord*, NEWSWEEK, Feb. 6, 1984, at 52.

²²⁷ See Carl B. Boyd, Jr., Comment, *Countless Free-Standing Trees: Non-Labor Boycotts After NAACP v. Claiborne Hardware Co.*, 71 KY. L.J. 899, 900 n.9 (characterizing the grape boycott as “as much a social as a labor cause”).

²²⁸ See *Groups Join United Farm Workers' Boycott of California Table Grapes Over Pesticide Use*, Daily Rep. for Executives (BNA) No. 245, at A1 (Dec. 23, 1987).

²²⁹ An argument that the government could forbid boycotts from attempting to induce behavior that the government could not require would rely on analogous treatment of associations. Boycotts are clearly a form of association. Although freedom of association normally receives considerable constitutional protection, the government has some power to prohibit associations from engaging in membership discrimination that would be unconstitutional for the government to require. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (upholding a state statute requiring admission of women into Jaycees group). Whether *Roberts* is limited due to the commercial nature of the Jaycees, because the Jaycees is a part of the communities' power structure, or for some other reason should be given more consideration.

²³⁰ It is periodically asserted that the government can outlaw boycotts—or picketing—designed to induce illegal behavior. But see BAKER, *supra* note 11, at 161-93, 223-24 (implicitly rejecting this notion except when applied to business enterprises). It would seem analogous to outlaw boycotts designed to prevent behavior that it would be unconstitutional for the government to prohibit.

to bring about a result which the government is prohibited from mandating would be unacceptable.²³¹

Second, most boycotts are democratic in that their power is derived largely from the number of people who join them—or, at least, from the summation of the boycotters' buying power.²³² The target is induced to compare the injury it causes some people, roughly measured by the damage imposed on it by the boycott participants, to the benefit of continuing the offensive behavior, often measured by other people's willingness to pay for the product, and hence, the offending behavior. The movie house compares ticket sales to those who want to see the "offensive" film with the costs imposed by those who picket or boycott. Of course, the target of the boycott also has long-range strategic concerns, such as showing a willingness to stand up to pressure. Still, most boycotts affect behavior in a manner that represents a very rough summation of the costs and benefits of the activity from the perspective of the public. The boycott forces the target to "internalize" into its decision making some of the offensiveness of its activity. It is a form, if a rather crude form, of democratic politics.

In contrast, a consumer boycott aimed at pressuring advertisers to avoid being associated with certain media content magnifies the boycotters' power, arguably reducing its democratic character. First, costs and benefits are calculated only from the perspective of the advertiser. Given the small chance that an advertisement will influence any individual viewer, each alienated viewer costs the advertiser more than is gained from each viewer pleased by the programming. Each boycotter, and each non-boycotting but offended potential customer, is as significant to the advertiser as a large number of pleased viewers. Second, as long as most viewers of offensive "show X" can be obtained at a similar cost by benign "show Y," even if the controversial content is particularly valued by its viewers, the economically rational advertiser, unable to capture this consumer surplus,²³³ has no reason to sponsor "show X." A

²³¹ In giving constitutional protection to a boycott of a newspaper's advertisers designed to change the newspaper's editorial policy, a California court noted that this "troublesome" boycott did not involve "government action," but was similar to the power an advertiser can legally exert over newspapers. *See Environmental Planning & Info. Council v. Superior Court*, 680 P.2d 1086, 1092 (Cal. 1984).

²³² Although buying power is not equally distributed, a consumer-product boycott's dependence on individual backing makes it much more a matter of popular participation than the typical elite distribution of decisionmaking power.

²³³ Interestingly, advertisers' virtually reflexive tendency to avoid potentially

small number of boycotters are therefore able to impose a cost on an advertiser that is greater than the small gain it could obtain by providing the "offensive" material desired by a large audience. This dynamic systematically denies the "voice" of those who desire the media product.²³⁴

Thus, even if the vast majority of television viewers would like to see a program that took a controversial position, a realistically threatened boycott by a relatively small number of viewers is often enough to make a "rational" sponsor withdraw. After the National Rifle Association organized a letter writing campaign directed in part at sponsors of the CBS documentary *Guns of Autumn*, the only advertiser that did not withdraw sponsorship was Block Drug Company.²³⁵ During the McCarthy era, Block Drug complied with the demands of Laurence Johnson, who threatened organized consumer pressure because of Block's sponsorship of television programs that included "politically suspect" performers. Wisdom, if not economics, is sometimes learned. Now, regretting having "knuckled under" in 1950,²³⁶ Leonard Block simply said "It doesn't pay to give in to those fellows."²³⁷

From a democratic perspective that values both responsiveness and pluralism in communications, boycotts to persuade advertisers to control content should be troublesome in at least two ways. First, the vulnerability of advertisers to pressure results in the views of a comparatively small number of viewers becoming disproportionately

offensive material may apply less to sellers of more sophisticated products, which have smaller, more selective buyers. For example, Xerox's television policy stated that its programs "will not only entertain [but] will tend to stretch the mind, to inspire, to stir the conscience and require thought. Our programs should try to advance TV over what it has been." BARNOUW, *supra* note 141, at 112. This strategy may capitalize on the "consumer surplus" of this programming, and these advertisers may have less to fear from boycotting activity.

²³⁴ Networks feed this result. Although obviously furious when advertisers pull sponsorships at the last moment because some controversial program element has slipped past the network's censors, the networks recognize their dependence on advertising revenue. They have adopted the practice of not identifying the sponsors who withdraw, thereby reducing the potential embarrassment to these sponsors. See Fahey, *supra* note 217, at 671, 676.

²³⁵ See BARNOUW, *supra* note 141, at 136.

²³⁶ See *id.* at 48-49.

²³⁷ *Id.* at 136, 136 n.*. Boycotts are not the National Rifle Association's only weapon. An NBC documentary initially presented a need for restrictions on ownership of firearms. Prior to its broadcast, however, the program was dramatically watered-down, despite strong opposition from the President of the news department, because of the N.R.A.'s threat of fairness doctrine complaints. See ROBERT MACNEIL, *THE PEOPLE MACHINE* 270-71 (1968) (quoted in EPSTEIN, *supra* note 203, at 68-69).

influential in decisions concerning the content offered in advertiser-supported mediums. The boycotters occupy a more powerful structural position than readers or viewers favoring particular contents.²³⁸

Second, the net effect is systematically to reduce offerings, not to expand them. Kathryn Montgomery's portrayal of the wide variety of activist groups trying to affect prime time programming suggests a pattern to their politics.²³⁹ Sometimes, through lobbying or developing working relationships with network executives or program producers, a group is effective at getting more as well as better portrayals of its group or cause. Gays and Grey Panthers, she reports, have been particularly adroit at these politics.²⁴⁰ Pressure on advertisers and use of boycotts, however, have only been effective in keeping material out.²⁴¹

Putting aside economic objections to how this process causes those who control programming content to fail to internalize the benefits of the programming, these boycotts operate to restrict the diversity and pluralism of our informational and entertainment environment.²⁴² In addition, the boycotts are objectionable from a perspective that values individual liberty and autonomy. Social choices about the options made available to a person should not take account of others' preferences that she not have those options. In policy making, not counting such preferences to restrict other's options is central to respecting liberty and autonomy in a soci-

²³⁸ See Fahey, *supra* note 217, at 684.

²³⁹ See MONTGOMERY, *supra* note 213, at 8-9.

²⁴⁰ See *id.* at 68-69, 85-89.

²⁴¹ Conceivably, people could boycott advertisers that fail to advertise on (or withdraw from) controversial programming or that support mindless mediocrity. Problems of organizing such a boycott should be obvious. In part because it is harder to pinpoint responsibility for non-action (for example, for not sponsoring a program), it is hard to imagine boycotts aimed at forcing advertisers to sponsor broader coverage.

²⁴² Sometimes this might not seem so bad. Television's exploitation of violence and sex (at least implied sex) is criticized for its mindlessness and, more importantly, its possible corrupting influence. Many who would be offended if the government suppressed this possibly harmful programming would be happy if popular action, such as consumer boycotts, pressured networks to restrict these presentations. I have no clear answer to whether this concern justifies leaving broadcasters vulnerable to these boycotts. Still, even majoritarian private pressure to restrict offerings, and often this pressure is not majoritarian, should be problematic whether or not we paternalistically like the results. In a later article, I plan to recommend changes in media structure that would increase the journalistic, creative, and artistic professionals' role in controlling media content, a change that I predict would result in a net enrichment of offerings rather than a mere increase in sex and violence.

ety.²⁴³ But counting such preferences is precisely the effect of these boycotts.

D. Content Tailored for the "Right" Audience

Democracies always distribute some goods on a more egalitarian basis than the market system's criterion of willingness and ability to pay.²⁴⁴ For example, most modern democracies at least "formally" distribute political authority on the basis of one-person-one-vote rather than the market system's one-dollar-one-vote. Likewise, most democracies consider certain goods—education, food, medical care, and housing, for instance—too important to allow anyone to do without. The close relation of a free press, protected by the First Amendment, to democratic processes suggests that access to news and information,²⁴⁵ like the right to vote, ought to be distributed on an egalitarian basis. Everyone should be able to receive the news, information, and other products of the mass media that they find helpful in their lives. Public libraries represent a small attempt to move in that direction. The assumption that our mass media depends on advertising for its viability implies that advertising serves this democratic goal. Nevertheless, advertising often has the opposite effect. Although advertising has multiple, cross-cutting effects on the distribution of media content, one tendency is to make that distribution even less egalitarian than it would otherwise be. Advertising also makes the media even less responsive to the needs of the poor and other marginalized groups than would a market system in which people pay the full costs of the product.

²⁴³ See C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381 (1978).

²⁴⁴ See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 103-07 (1983). Liberal theory requires and justifies this result. See JOHN RAWLS, *A THEORY OF JUSTICE* 75-83 (1971); C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 959-72 (1983).

²⁴⁵ Even though there has been no generally recognized constitutional right to demand that the government provide people with information, both federal legislation like the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988), and state equivalents, as well as Open Meeting Laws, implicitly recognize the importance of providing the public with information. The FOIA provides for the furnishing of copies of documents without charge if "disclosure . . . is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552 (a)(4)(A)(iii) (1988). However, the FOIA does not have any waiver for indignity of the requester.

Advertisers "pay" the media to obtain the audience they desire, providing a strong incentive for the media to shape content to appeal to this "desired" audience. The right audiences are crucial for television. *Gunsmoke* is probably the most frequently cited show canceled while still high in the ratings. The same apparently happened to the *The Virginian*.²⁴⁶ The shows' viewers were simply too old and too rural to be worth much to advertisers.²⁴⁷

Similar pressures operate in the print media. Bagdikian describes how in 1967 *The New Yorker* suddenly began to lose advertisers and money.²⁴⁸ Although there was no drop in circulation, readers' average age dropped from 48.7 to 34 years as young people responded to *The New Yorker's* critical coverage of the war in Vietnam.²⁴⁹ These young people were simply the wrong readers.

Since newspapers and magazines generally sell for less than the cost of production, they lose money unless they can sell the reader to the advertiser. Thus, it should not be surprising that newspapers sometimes purposefully limit or reduce circulation in areas or among people whom advertisers do not value. Otis Chandler, head of Times Mirror, explained that "[t]he target audience of the [*Los Angeles*] *Times* is . . . in the middle class and . . . the upper class;" elsewhere he said that the *L.A. Times* had "arbitrarily cut back some of [its] low-income circulation," because "American newspaper publishing is based on an advertising base, not a circulation base."²⁵⁰ Chandler noted that giving more attention to minority issues "would not make sense financially . . . [because] that audience does not have the purchasing power and is not responsive to the kind of advertising we carry."²⁵¹ Pursuing circulation increases without thought about its character is an economic mistake. *The Times* in London "twice increased circulation only to find advertisers were uninterested in reaching the students and lower income intellectuals who made up the bulk of the new readers."²⁵²

²⁴⁶ See BARNOUW, *supra* note 141, at 73 n.59.

²⁴⁷ See *id.* at 73.

²⁴⁸ See BAGDIKIAN, *supra* note 18, at 105-13.

²⁴⁹ See *id.* Bagdikian argues that William Shawn, the editor, was able to maintain this editorial course because *The New Yorker* was independently owned. A conglomerate would have eliminated the Vietnam content in order to regain the "right audience" and, thereby, the advertisers. *The New Yorker*, economically healthy again by the 1980s, was sold to Newhouse, a media conglomerate, in 1986. Newhouse replaced William Shawn the next year. See *id.* at 110, 113.

²⁵⁰ *Id.* at 116.

²⁵¹ STEPHEN BATES, IF NO NEWS, SEND RUMORS 198-99 (1989).

²⁵² DUNNETT, *supra* note 18, at 28.

This tilt is hardly egalitarian.²⁵³ Newspaper and broadcasting advertisers are comparatively disinterested in media production designed to satisfy the needs or preferences of anyone without the disposable income that advertisers covet. In a 1960 study of national daily newspapers in Britain, the advertising rate (the rate per column inch per 1000 copies sold) of "quality" papers was roughly four times the rate of the popular papers.²⁵⁴ Advertisers paid much more of the newspaper's cost when, as is the case with the "quality" papers, the paper's content appealed to the "right" audience. The result is that advertising subsidizes newspapers designed for precisely the people most able to pay without a subsidy.²⁵⁵ It subsidizes news designed for the affluent, not the poor.

Purported deregulatory, "polyannish" implications of economic theory should be viewed with suspicion, but here, economic theory predicts that an "unregulated" market will produce social results that are widely and properly condemned. It predicts that a subsidy normally will promote consumption of the subsidized good. Subsidizing products made for a particular group should result, generally, in benefitting that group and, more specifically, in making that group become relatively greater users (purchasers) of that product. That is, the advertising "subsidy" predictably slants press content toward the interests of the more affluent and predictably leads to increased purchases by this group. If media usage promotes political interest,²⁵⁶ particularly among those to whose political interests the media responds, and if, as economic analysis predicts, advertising leads the media to be oriented toward the more affluent, then the advertising-supported media should stimulate political interest primarily among the comparatively affluent. Thus, advertising's subsidy not only distributes news in an

²⁵³ A major study of American magazine publishing predicts that a future result of this advertiser-induced targeting is "that entire neighborhoods will be eliminated as publishers and advertisers zero in on the most affluent markets." JOHN TEBBEL & MARY E. ZUCKERMAN, *THE MAGAZINE IN AMERICA 1741-1990*, at 381 (1991).

²⁵⁴ See Reddaway, *supra* note 20, at 207.

²⁵⁵ Reddaway reported that surplus per copy from advertising (the amount obtained from advertisers after paying the costs to the newspaper of including the advertisement), a surplus available to reduce the price of the paper or to go toward profits, was 1/2 *d.* for the popular paper and 5 *d.* for the quality paper. See *id.* at 206.

²⁵⁶ According to a careful statistical study, in the 1968 to 1980 period, "[t]he decline in newspaper reading alone can be held responsible for almost two-thirds of net [voter] turnout decline and about one-third of the SES [socioeconomic status]-adjusted total." TEIXEIRA, *supra* note 125, at 88.

even less egalitarian manner than would a market system where readers pay the full costs of the paper, but it also quite likely depresses political participation of the poor.

Advertising is only one factor determining the content of mass media. Reader or viewer preferences, levels of competition and ownership concentration, preferences and interests of owners, press traditions and professional norms (which are presumably "partially" autonomous, that is, only partly reflective of the economic and legal structure), values and backgrounds of press professionals, government pressures and subsidies, technology and organizational dynamics are among the other determinants. Nevertheless, if for no other reason than that it pays much of the bill, advertising plays a major, systematic role that pushes the mass media in readily predictable and observable directions. First, advertising disfavors media accounts of inadequacies or dangers of advertisers' products, exposés of wrong doing by advertisers, and serious critiques of those aspects of the social world on which advertisers depend. Advertisers generally favor a view of most societal problems as non-systemic and resolvable by good faith individual initiative just as they favor viewing individual concerns as solvable by appropriate consumption. Second, since critical thought or attention focused on serious social problems is believed to undermine a buying mood, advertising often favors lighter material. Third, since advertisers wish, with the caveat mentioned in point four below, both to reach a maximum audience and to avoid offending any potential purchaser, advertising encourages the media to forego taking positions on controversial issues. Advertising is fully supportive of the objective stance—and of "balance." Fourth, advertising systematically causes the media to serve the needs of the comparatively affluent; that is, it subsidizes media that adopt the perspectives and fulfill the information needs of the more affluent.

Each of these four systematic effects of advertising represents a profoundly troubling failure from a democratic perspective. Exposure of major wrong-doing and of dangerous conditions (and products), provision of media content in a manner that responds equally to the needs and concerns of all people, responsiveness to the differing values and concerns of diverse readers/viewers, education about and inspiration to confront major issues, and a willingness to lead partisan crusades for change are qualities that should characterize a democratic press. But these are precisely the qualities that advertising undermines. Any program aimed at a more effective, more egalitarian, more participatory political and

social order must consider whether the media structure that produces these negative consequences can be usefully changed without inhibiting or stifling the positive effects of advertising in a free press.

Part IV will consider whether there are any legal changes that properly respond to the negative effects of advertising without undermining its positive contributions. First, however, a detour will be helpful. Despite the specific criticisms of advertising, media output represents the results of various "purchasers" paying in a free market to obtain results they prefer. Free markets are often thought to lead to "efficient," socially desirable results. Therefore, Part III will subject my criticisms of the influence of advertising to an economic evaluation.

III. ECONOMIC ANALYSIS OF ADVERTISING'S EFFECT ON THE MEDIA

The influence of advertising on the media's non-advertising content described in Parts I & II should be very disturbing. Most readers are likely either to agree that something is terribly wrong with our press or to rationalize Parts I & II as presenting only isolated examples within a larger institution that is fundamentally sound. However, a few doctrinaire free market advocates may be more defensive, arguing that advertisers' influence is actually not bad at all. Their claim requires a response.

These free marketeers assert that an unregulated market, which encompasses purchases by advertisers, leads to optimal outcomes.²⁵⁷ According to their analysis, although many consumers would prefer that advertisers had less influence on the mass media, the relevant question is what trade-off they would make to reduce this influence? If the relevant datum is media consumers' current purchases, the evidence is that they are unwilling to pay enough to

²⁵⁷ See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209-10 (1982) (stating that "[c]ommunications policy should be directed toward maximizing the services the public desires. . . . [T]he [Federal Communications] Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace."); *id.* at 211 (claiming that "[i]n the fully deregulated marketplace, the highest bidder would make the best and highest use of the resource," and discussing Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1, 20-21 (1959)). As Chair of the FCC, Fowler implemented most of the proposals contained in his article. See also Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 49 Fed. Reg. 33,588-33,620 (1984) (codified at 47 C.F.R. pts. 0-73).

make an "independent" media be prevalent. Apparently, media consumers prefer a world in which advertisers pay much of the cost of media products. Advertisers thereby provide the media consumer both with advertisements, which the consumer can ignore but may desire as a source of information, and cheaper, somewhat advertiser-influenced media product, making the media more widely accessible. The market combines preferences of readers, viewers, and advertisers to produce welfare maximizing (or, at least, "efficient") results that are preferable to anything that would result from regulation.

The free marketer's claim depends, however, on crucial empirical and normative assumptions. First, the claim requires that the market brings the positive and negative effects of media production fully to bear on media decision makers. Second, it depends on the propriety of relying on preferences as expressed by willingness- and ability-to-pay to determine media production and distribution.²⁵⁸ In economic terms, the free marketer's claim assumes that the media market leads to "efficient" results and that "efficiency" is a proper goal of production and distribution. This section describes some reasons why, in relation to the effects of advertising,²⁵⁹ neither assumption is correct.

A. Market Failures

1. The Decline of Competition

Part I showed that the success of a largely advertiser-supported newspaper may put two or more differentiated, reader-supported papers out of business.²⁶⁰ As the advertising "subsidy" makes the

²⁵⁸ The free marketer's claim could also be defended not on the ground that these assumptions are true but that they are close enough, and that any alternative to the free market would be worse. This version of the claim can only be assessed empirically and comparatively. An analyst would have to evaluate each proposed deviation from the "free market" to determine whether it should or should not be expected to improve media performance. Within the limits of insufficient information, the policy section, Part IV *infra*, engages in that inquiry.

²⁵⁹ There are many other ways that the unregulated market predictably fails with respect to media production and distribution, but most of these failures are left for a later article.

²⁶⁰ I use the terms "advertiser-supported" and "reader-supported" in a relative sense. Reader-supported does not exclude all support from advertisers, and vice-versa for advertiser-supported; the terms only refer to the dominant form of support or, in a comparison, to the paper that receives the higher portion of its support from that source.

advertising-supported paper cheaper to the reader, some readers desert their preferred, more narrowly focused, "differentiated" papers. In economic terms, the advertising-supported paper's entry into competition causes a leftward shift in the demand curve for the differentiated, reader-supported papers. This leftward shift could result in the downward-sloping average cost curve being constantly above, no longer crossing, these papers' demand curves. When this occurs, the entry of the advertising-supported paper would cause the failure of the competing, differentiated papers.²⁶¹ The question is whether this result can be criticized on economic grounds: whether the new competitive equilibrium is or is not "efficient?"

The question cannot be answered abstractly and there is not enough empirical information for a clear-cut answer. The answer depends on the shape of the demand (and supply) curves of the respective papers, or, more specifically, on the consumer surplus obtained by readers of the different papers. If the differentiated, reader-supported papers had much more steeply declining demand curves than the surviving, advertiser-supported paper, that is, if the reader-supported papers produced a much greater consumer surplus, then the social value produced by the competitive winner, the advertiser-supported paper, may be less than the value produced by the failed, reader-supported papers.²⁶²

²⁶¹ Sometimes otherwise unprofitable specialized publications survive by engaging in a form of "voluntary" price discrimination. They solicit readers to contribute something beyond the subscription price, which the solicitation notes is insufficient to cover the publication's costs. For example, in a recent solicitation letter, *The Nation*, noting that despite the largest readership in its 125-year history, reported that it was struggling to stay alive. The appeal said: "We depend on the *Nation's* Associates to provide at least 10% of our very slim annual budget. . . . Unlike most magazines, we can't count on advertising revenue. . . . [M]ost advertisers are too timid or too interested in the status quo. . . ." Letter to *The Nation* Readers (Sept. 1991) (on file with the author).

Those who respond to such requests are giving to the publisher some of the consumer surplus that they previously received. They may be contributing because they want others, not just themselves, to be able to continue to receive the publication; that is, they may be internalizing some of the "external" benefit they receive from others purchasing (and reading) the publication. It should not be surprising that quite partisan publications like *The Nation* or *NACLA* receive relatively little advertising revenue and must make such solicitations. The analysis in the text also suggests that were it not for the role of advertising in reducing the price of "competing" publications, *The Nation's* chances of continuing even without these special appeals would increase.

²⁶² This conclusion that the competitive winner may not be socially optimal can be seen in various ways. Consider the following argument:

1) It is clear that without price discrimination, a declining marginal cost industry (or firm) may not be viable even though it would be profitable (and efficient) with

This argument that competition can result in inefficiency assumes that, in this monopolistic competition, firms are not able to effectively price discriminate. To a significant degree, the assumption seems true for daily newspapers.²⁶³ Of course, if each paper could perfectly price discriminate, and if the demise of the reader-supported papers would have been inefficient, then the reader-supported papers could survive even after the introduction of the advertising-supported paper.²⁶⁴

Although there is insufficient empirical information to know which arrangement is most efficient, some factors point in favor of the differentiated, reader-supported papers. The differentiated papers rely most heavily on fulfilling readers' special interests instead of being aimed at some lowest common denominator. Thus, each of the differentiated papers could be expected to be highly valued by the comparatively small, discrete group at which it aims—that is, a relatively steeply declining demand curve could be expected. In contrast, the advertiser-supported paper is less

price discrimination; that is, its demand curve may never cross the average cost curve, but be mostly above the marginal cost curve.

A simple example can illustrate this point. Assume that the cost of producing the first copy of a paper is 20 cents and the second is 5 cents, and that the first reader would pay 18 cents and a second would pay 12 cents. Selling the paper at either 18 cents (getting one buyer) or 12 cents (getting two), results in a loss, and the business would not exist, although the cost of production of two copies is 25 cents and their value is 30 cents.

2) The introduction of product A can cause a leftward shift in demand for product B because some previous purchasers of B now prefer A at the price offered.

3) The shift in demand for product B caused by the introduction of product A can cause the producer of B to change from being a viable natural monopoly, that is a firm whose demand curve does cross the average cost curve, to a firm like (1) above that is not economically viable (without price discrimination).

4) Depending on the nature of the demand for products A and B, that is, depending on the extent of consumer surplus each produces, the introduction of A could cause a net decline in social welfare (efficiency).

²⁶³ It may be, however, that the lack of observable price discrimination reflects a relatively flat demand curve rather than an inability to price discriminate, a point suggested by Professor Michael Wachter.

²⁶⁴ This specific problem of competitively produced "inefficiency" applies uniquely to monopolistic competition between declining cost firms. Although monopolistic competition may occur more frequently than is commonly thought, in the more commonly analyzed cases of perfect competition, the efficient level of production (assuming no externalities) is where the firm's marginal costs equal average costs and equal marginal revenue. This will be the equilibrium position. In this situation, since average costs equal marginal costs, consumer surplus is irrelevant to the question of what an efficient level of production would be. In this situation, the ability to price discriminate relates only to the distributional issue of the firm's ability to capture for itself wealth that would otherwise be left in the hands of consumers.

oriented toward fulfilling any focused desire for its content. Rather it tries to make a product acceptable to a wide range of readers and to obtain these readers by its comparative cheapness. Fewer people are likely to value this advertiser-supported paper much more than they pay for it—that is, it is likely to have a *comparatively* flat demand curve. These predictions concerning the nature of the demand for different newspapers support the claim that if the advertiser-supported paper prevails competitively over otherwise viable reader-supported papers, this competitive outcome will cause a net loss of social value as measured by people's willingness to pay.²⁶⁵

2. Advertiser distortions of content

Journalistic purists will object to *any* advertiser influence over non-advertising content—to any violation of the media's wall of separation between church and state. Surely, many people object to advertiser influence over the content of news and entertainment described in Part II, to advertiser-induced bias in favor of corporate products and values, to the design of programming to stimulate

²⁶⁵ I have found no discussion in the media economics literature of either the possibility that advertising could reduce competition or the notion that this could result in inefficiency, hence a welfare decline. However, in a more general, very mathematical discussion, Professor Clement Krouse demonstrates that in monopolistic competition, assuming no price discrimination (which was my assumption above), the equilibrium position could involve either an under, over, or appropriate supply of product diversity. See CLEMENT G. KROUSE, *THEORY OF INDUSTRIAL ECONOMICS* 190-218 (1990).

Krouse shows that whether there will be too little (or too much) diversity will depend on the specific nature of people's demand curves and producers' supply curves. In a summary passage, he concludes: "A firm offering a new product gives consideration to the net revenues that will be created, not the amount of consumer surplus. This tends to produce *too little product variety*." *Id.* at 214 (emphasis added). Assuming, as I argue, that the reader-supported papers produced the steepest demand curve, they would be the firms producing the greatest consumer surplus, and thus the firms to which this remark applies most strongly. That is, it is these firms that will not exist even though their existence is welfare maximizing. Then Krouse continues: "Against this, the firm gives no consideration to the external effect that its entry has on the demand for substitute products offered by existing firms, an effect which tends to produce too much variety." *Id.*

Assuming that the advertising-supported firm has the largest effect on demand functions for other firms, the advertising-supported paper will tend to be the variety not justified by welfare criteria, even though market-supported. In other words, competition tends toward introduction of advertising-supported media that are not optimal and that tend to drive out of existence diverse, reader-supported varieties that are socially optimal.

I am grateful to Ed Rock for pointing me to the Krouse study.

buying moods rather than critical thought, and to the middle of the road avoidance of offense and partisan advocacy.

The free marketeer responds that both advertisers and media consumers engage in transactions with media producers.²⁶⁶ Both purchasers, the consumer and the advertiser, have an opportunity to pay for the content they prefer. Even granted that most consumers prefer a product uninfluenced by advertiser interests, the question is whether they desire the "pure" product enough to pay for it or, alternatively, prefer the "influenced" content at the lower price. The free marketeer suggests that although this question cannot be answered abstractly, the market does provide an answer—the right answer given people's preferences. If people purchase advertiser-influenced media content, they are saying that is what they want, given its cost and the cost of its alternatives.

This analysis does not hold up. First, as newspaper publishers know, most readers or viewers do want media content untainted by advertiser influence. Being known to slant news in favor of advertisers injures a newspaper's reputation and its ability to sell its product (at a given price). Many of the more successful media owners at the turn of the century reached precisely this conclusion. Increasingly, they publicly opposed the practice of accepting "reading notices"—advertisements disguised as news.²⁶⁷ Most media enterprises depend on maintaining the public's belief that they live up to the fundamental professional norm of separating the business side (advertising) of the enterprise from the journalistic or creative side. Apparently they conclude that the public would pay more for purity than advertisers would pay for influence. Media enterprises typically try to cover-up or minimize any advertiser influence that does occur. Exposés of advertisers' influence on the media are news items—to be publicized in *Columbia Journalism Review*, books of media criticism, and sometimes other papers. The damage an exposé can cause an offending enterprise illustrates the high value the public (and the profession) places on media purity.

Even if a media enterprise concludes that it is better off being "pure" than being *known* to be influenced, it will be tempted to try to sell both influence and purity—to sell influence to advertisers without letting the reader know. The reader cannot know all the judgments figuring into the decisions about what news or entertain-

²⁶⁶ In the case of broadcasting, the consumer "pays"—that is, indirectly brings her preferences to bear by choosing whether to watch and what programs to watch.

²⁶⁷ See *supra* notes 153-61 and accompanying text.

ment to offer. Constant opportunities arise for the media enterprise to secretly allow advertiser influence.²⁶⁸ Of course, there is a word for selling influence to the advertiser and purity to the consumer. Fraud. The media purports to give the reader an untainted product under circumstances where it is difficult for the reader to identify the deception. All the economic reasons why fraud should be prohibited apply here.²⁶⁹ The media enterprise "externalizes" harm onto readers who, because of lack of knowledge, cannot "efficiently" bring the economic "injury" to bear on the media enterprise's decision making. The reader's only recourse is to gather information about advertiser influence and then engage in joint action with all the other injured parties against the offending media enterprise.²⁷⁰ Usually such information gathering and collective action are just too expensive to be an effective deterrent.

There is a second aspect of this market failure. Advertiser's influence on media content has effects on third parties beyond the immediate readers. In a world where we are all interdependent—which is probably a good description of the human condition but is virtually the definition of the political sphere—what others think affects us all. It can be a gain to me if other people's views about war, welfare, nuclear power, the economy, honesty, land-use, consumerism, ethnicity, tobacco, etc., are influenced by journalists' and writers' honest attempts to make sense of the world rather than being manipulated by advertisers. Even if I do not use a particular medium, I might be willing to pay to have it untainted by advertising. However, no market efficiently brings these third party "preferences" to bear on media enterprises' decisions. In the absence of such a market mechanism, the enterprise will fail to take

²⁶⁸ Advertiser influence can be so embedded in journalistic routine that even media personnel are not aware of it, although advertisers reward the media enterprise for it.

²⁶⁹ See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. OF LEGAL STUDIES 1 (1978).

²⁷⁰ Another way papers externalize the harm of advertiser's influence, thereby avoiding taking into account the full consequences of its action and avoiding pressures to act "efficiently," is to externalize the harm onto a "commons"—the public's general perception of the media. Public perceptions of media's integrity are partially generic. If it is exposed that advertisers influenced a particular paper, some of the public is likely to remember the fact of advertiser's influence on the media independently of which paper acted improperly; even those who connect the paper with the "impropriety" will often assume, probably properly assume, that the impropriety illustrates a more pervasive problem that does, or could, affect other papers.

into account a real cost of advertiser-influence, thereby "externalizing" this cost and producing to an injurious "inefficiency."

B. *Inappropriateness of the Efficiency Standard*

The efficiency criterion, as generally defined in economic models, must take as given some distribution of wealth and some set of preferences. Usually these models, and certainly the "free market" analyses, take as "given" existing distributions of wealth and existing preferences. Thus, these analyses are inappropriate anytime these existing distributions and preferences are not properly accepted as the given. Most obviously, these analyses are inappropriate when the relative desirability of different distributions and various preferences (or values) is at issue.²⁷¹ These contexts require other evaluative standards. The most plausible candidate for at least part of the evaluative work is a one-person-one-vote dialogic politics.²⁷²

Evaluations of media content and media distribution should turn on answers to questions that are logically prior to and that strive to be independent of the existing distributions of preferences and wealth that are the economic model's "givens." First, the evaluation asks, how egalitarian should the distribution of news, information, and culture be? Second, it asks, under what circumstances will the content of media properly serve people in their development of values and preferences?

Media usage is a form of entertainment—a form of consumption. But it can be something more. The mass media can be an

²⁷¹ One reason economic analysis is inherently indeterminant in its "law and economics" applications is that the efficient outcome depends on the given distribution of wealth but the choice of law partly determines the distribution of wealth, hence there is no "given" distribution on which to rely. See C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 16 (1975) [hereinafter Baker, *Ideology*].

Similarly, the choice of law can often be expected systematically to affect preferences, leading to a second cause of indeterminacy. In short, the theory has no internal basis for concluding whether the preferences at the time of the choice of the law or those influenced by the law provide the appropriate evaluative stand point. See C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 481-82 (1978).

²⁷² This could be seen as one theme in much of Frank Michelman's recent work on republicanism. See, e.g., Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989); see also Baker, *Ideology*, *supra* note 271, at 40; C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491 (1989).

important educational force. The press is probably the primary source of current political knowledge and a locus of political debate. Unsurprisingly, a "free" press, not just an entertaining press, is widely seen as an essential element of democracy. These uncontroversial observations suggest that the distribution of the vote and of education provide the most obvious analogies in considering the proper distribution of media content. Further considerations reinforce this conclusion.

An ideal democracy depends on or, at least, is furthered by citizens being adequately informed. Therefore, a commitment to democracy argues persuasively for treating access to media content as a "merit good" to which all citizens should have access, at least access to some reasonable amount. Arguments for "cultural democracy" support the same conclusion. Like the right to vote, and arguably like such goods as food, shelter, medical care, and especially free public education, people have a rightful claim to access to the media whether or not they have the resources necessary to gain that access in the market. Thus, liberal democratic theory suggests that even a properly functioning market, as long as that market relies on a very inegalitarian distribution of wealth, is deficient here. Instead, democratic theory calls for a more equal distribution of media content.

Even if a market is inadequately egalitarian, to the extent that advertising reduces the cost of media content to the consumer, advertising serves this democratic goal. But as was shown above,²⁷³ advertising primarily subsidizes media content most desired by the relatively more affluent. In some circumstances, advertising can even cause the cost of media desired by poorer people to go up or its availability to go down.²⁷⁴ These distributive effects of the "free market" are the opposite of those called for by liberal or democratic theory. From the perspective of democracy, which is the proper perspective to evaluate most distributional questions, the market fails.

Second, markets are aimed at satisfying people's existing preferences. This objective is inappropriate for determining the media content that people need in order to properly develop values and preferences. Education, much of religious inquiry, and authentic politics involve people engaged in value formation. People transform the information and perspectives that they receive

²⁷³ See *supra* notes 244-56 and accompanying text.

²⁷⁴ See *supra* notes 244-56 and accompanying text.

into values and preferences. Media content plays a major role in this process. People value media to a significant degree because of that role. But in performing this role properly, the media should not give people merely what they want to hear or see, or what a market-oriented media finds most profitable to give them. What people "want"—or ought to want—in journalists and editors is what they want in educators, priests, and politicians: individuals who exhibit, first, integrity and, second, wisdom and judgement in their communications. People's immediate "preference" may be to kill the messenger who brings bad news, and the market often defers to such preferences.²⁷⁵ Still, frequently people also expect, and in some sense want, journalistic professionals to provide even the bad news. Politics and preference formation is corrupted if the utility companies pay to control news about nuclear power or if General Electric controls our information on weapons programs and defense needs. Given the media's role in value or preference formation, it should not merely reflect market-expressed preferences or, even worse, market-dictated enterprise interests. Rather, like education and politics, the media should be structured to embody and encourage processes of value or preference formation that express our image of what it means to be a person and a wise, democratic society. The problem is that this conclusion lives in tension with our practice of leaving the media mostly subject to the market—and even more so with the view, sometimes expressed, that being so subject is what freedom of the press means.²⁷⁶

However viewed, advertising's influence on media content is objectionable. First, such influence leads to market failures, frustrating the "efficient" creation and distribution of media

²⁷⁵ In explaining the alternation of *CBS Evening News*' coverage of Reagan and Reaganomics in 1982-83, Mark Hertsgaard describes a changed management more focused on the bottom line. According to *Evening News* producer Richard Cohen, the new management "had a view of what kind of news made for good ratings: more features, make it light and bright, soften it up. Don't be negative about the President, people don't want to hear that." HERTSGAARD, *supra* note 95, at 163. One reason for the shift in the coverage of the President was "a belief that upbeat, positive, 'patriotic' reporting about the President would make people feel good and thus produce higher ratings." *Id.* at 170. CBS's coverage demonstrated that it did not want to be the bearer of the bad news about our President.

²⁷⁶ Cf. J.W. FREIBERG, *THE FRENCH PRESS: CLASS, STATE, AND IDEOLOGY* 1 (1981) ("The press is not an instrument of commercial profit; it is an instrument of culture. Its purpose is to give accurate information, to defend ideas, to serve the cause of human progress The press is free when it does not depend on either the power of government or the power of money, but only upon the conscience of its journalists and readers.") (quoting Albert Camus, *Combat*, Dec. 1944).

content. Even a doctrinaire free marketeer cannot defend this result. Second, the norms underlying our democracy suggest that market considerations should not determine either media content or distribution. Advertising's influence on media content exacerbates the distributive and preference formation problems associated with the market. Of course, to criticize the results of a (partially) unregulated market does not imply the existence of alternatives that would be better. But it does suggest the wisdom of looking for such alternatives.

IV. POLICY PROPOSALS

Convinced that advertising results in censorship, skews content, contributes to inequality and impairs media competition, one might propose banning advertising in the media. Such a move would be as undesirable as it is untenable. The proposal ignores the significant positive contributions of advertising in the media, the two most important being advertising's financial support of media communications and advertising's provision of information that media consumers desire. Nevertheless, targeted policies that reduce specific objectionable effects of advertising may provide net social benefits even if these policies also marginally reduce its positive contributions.

Before discussing specific regulatory and tax proposals relating to advertising, I should note several difficult to evaluate, but troublesome, potential effects of any regulation or tax of advertising.

First, any tax or other regulation of advertising will raise its price. This will predictably lead to some decline in advertising and cause some shift of advertising expenditures to advertising mediums not subject to the new tax or regulation. Policy evaluation of these changes will be equivocal.²⁷⁷ From the perspective of reducing advertising's influence on the media, the change is a plus; but from the perspective of financing media production, it is a minus. The more any proposal reduces advertising's influence without reducing its subsidy, the better. For example, there would be less shift of advertising to other media, such as direct mail, billboards, and point of purchase promotion, the more broadly the tax or regulation of

²⁷⁷ The policy issues mentioned below are from the perspective of promoting a democratic media. In addition, a full analysis would consider the effect of the tax or regulation on the positive and negative contributions of advertising itself. See *supra* text accompanying notes 11-12.

advertising applied. If advertising's "subsidy" of the media is important, a tax on all advertising would be preferable to a tax only on newspaper advertising.

Second, local advertising revenues provide a major incentive for a newspaper or broadcaster to be local rather than national.²⁷⁸ Since 1939, when national advertising was 19.2% of newspaper ad revenue, national advertising has never constituted more than 25% of total newspaper advertising.²⁷⁹ In the 1970s, newspapers received about 85% of their advertising revenues from local advertising. Thus, a tax on advertising could reduce support of localism. Surely in a country where important elements of politics are local and where newspapers provide the primary source of local news, information, and investigation, any decline in local papers is troublesome.²⁸⁰

Exempting classified ads from a tax or regulatory scheme might alleviate this reduced support of localism.²⁸¹ Classified ads are apparently very profitable to papers and account for a sizable portion of advertising revenues.²⁸² Their typically local orientation encourage papers' localism. Moreover, the large number and diversity of classified advertisers reduces the likelihood that they will have the power and organization necessary to apply pressure on a paper's content or editorial choices.²⁸³ Finally, classified ads

²⁷⁸ The increased ease of producing separate editions whose variation is primarily in advertising content may be undermining this presumably positive effect of advertising. Objections to this competitive pressure on local news supplies might be reduced, however, if more national (or regional) papers also provided extensive editorial content on a zoned or local basis.

²⁷⁹ See ROSSE & DERTOUZOS, *supra* note 18, at 36.

²⁸⁰ Alternatively, reducing advertising's influence might promote a local political orientation. Bagdikian suggests that the sixfold decline from about 1.2 daily newspapers for each urban area in 1900 to 1 newspaper for every five urban areas in 1980 reflects in part newspapers following the new regional advertisers of the shopping centers rather than political boundaries. See BAGDIKIAN, *supra* note 18, at 176-79. A reduction of advertising's influence and the corresponding increase in reader's influence could create incentives for either new papers or editorially zoned editions that respond to or generate public interest in local news and politics.

²⁸¹ Classified ads could be defined as ads below a certain size, without display or large type, published in a special section devoted to "classified ads."

²⁸² Newspaper advertising is typically categorized as national display, local display, and classified. In Rosse's "representative" paper, classified ads represented 23% of advertising revenues and 18.2% of total newspaper revenues. See ROSSE & DERTOUZOS, *supra* note 18, at 44.

²⁸³ This observation may be overly optimistic. Car dealers and real estate agents, long heavy users of the classified ads, have reacted with advertising boycotts to newspaper stories describing how to sell a house without an agent or reporting sharp practices among car dealers. These boycotts usually get results, as well as warn other

probably supply the best example of an advertisement providing not only information, but information sought by the readers who make use of the ad.

Third, restriction on advertising might encourage a move toward replacing "free" broadcasting and newspapers with non-advertising media that are currently at a competitive disadvantage due to broadcasters' and newspapers' advertising "subsidy." For example, a tax on advertising might encourage use of computer video display forms of "news" publishing as a means of delivering editorial content. I will not discuss the policy implications of such a development.

A. *Tax-Advertising/Subsidize-Readers (TA-SR) Proposal*

The goal of the TA-SR proposal is to reduce the influence of advertising on editorial content and to increase the newspapers' responsiveness to readers. Of course, the medium's attempt to obtain advertising revenue leads it to tilt media content toward what advertisers, not readers or viewers, want. This tilt increases as advertising provides a larger and larger share of a media enterprise's revenue (or, more precisely, as advertising provides an increasing amount of revenue in excess of the expenses directly attributable to advertising). Thus, any arrangement that reduces the incentive for a newspaper to obtain advertising or that increases the incentive to have readers pay more of the costs of publishing the paper would shift the orientation away from advertiser control. A reform that either taxed advertising revenue or that multiplied circulation revenue would increase the newspaper's incentive to focus on readers.

Government could employ both methods by taxing advertising (TA) and using the tax revenues to subsidize readers (SR). I will refer to this idea as the TA-SR proposal. For example, the government could impose a 10% sales tax on newspapers' advertising revenue, and redistribute this money back as a subsidy based on the paper's circulation revenue. If, hypothetically, the industry as a whole received 3/4 of its revenue from advertising and 1/4 from circulation, and assuming no change in advertising expenditures as a result of the tax,²⁸⁴ from the perspective of a media enterprise,

papers to exclude this useful reporting from their consumer sections. See RONALD K.L. COLLINS, *DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS* 19-25 (1992).

²⁸⁴ In Rosse's profile, a representative newspaper (with circulation of 50,000) in

the TA-SR proposal would reduce the revenue obtained from advertisers by 10% and increase revenue from circulation by 30%.²⁸⁵

The immediate result would be to reduce papers' incentive to respond to advertiser's wishes concerning editorial content and to encourage papers to provide a product for which readers are willing to pay. A tax on an economic activity amounts to a discouragement. The tax means that the paper will receive less advertising revenue. At the extreme, either the price of the ad to the advertiser will go up, reducing the number of ads purchased; or, if the paper absorbs the tax, the price to the advertiser will stay the same, but the tax will reduce the paper's receipts. Predictably, both effects will occur to some extent. But in any case, papers will have less of an incentive to respond to advertiser's concerns, and thus more of an incentive to respond to the other purchaser, the reader.

In contrast, a subsidy generally provides an incentive to have more of whatever is subsidized. For example, a direct subsidy of *circulation*, that is, a payment for each reader obtained, provides an incentive to increase readership—which could be achieved either by lowering the per copy price or by investing in a better product (sold at the same price). An equilibrium solution would presumably involve some of both—a lower cover price and some improved quality. Alternatively, the TA-SR proposal would subsidize

1977 received 76% of revenues from advertising and 24.8% from circulation. See ROSSE & DERTOUZOS, *supra* note 18, at 44. Elsewhere he estimates that daily newspapers receive 60% to 80% of their revenue from advertising. See *id.* at 29. Compaine's composite large city newspaper received 76.7% of its revenue from advertising in 1978, while his average medium size daily received 67.2% the same year. See COMPAINE, *supra* note 58, at 18-20.

An advertising tax could be expected to cause some reduction in advertising, and the increased incentive to receive revenues from circulation would cause that category of revenue to increase. Both of these changes result in a reduction in TA-SR's percentage subsidy of circulation revenue. The percentages in the text are illustrative. Under the proposed TA-SR program the subsidy percentages would be subject to regular readjustment.

²⁸⁵ The administration of the program would be relatively easy and could take various forms. For example, each newspaper could include in its yearly or quarterly federal tax returns a charge of 10% of its advertising revenue and a credit of x% of its circulation revenue, with "x" determined annually and being based on an estimate of the rate necessary to return to the newspapers as a group the 10% charge on advertising revenue. Papers that received more than an average proportion of revenue from advertising would make an increased payment while those receiving less than the average portion of revenue from advertising would receive a credit either reducing their taxes or possibly resulting in receipt of a payment from the government.

circulation revenue rather than circulation itself. The reason to reward circulation revenue is to induce responsiveness to reader demand, that is, to encourage the media to provide content that readers value rather than merely to encourage increased circulation.

The specific consequences of the TA-SR proposal on price and circulation of a paper are somewhat difficult to predict. First, since the paper gains more than before from getting people to pay for the paper, it will have an incentive to increase the investment in paper quality. The result is, in a sense, increased responsiveness to readers. Second, the paper might either raise or lower its cover price to readers, depending on which move would increase revenue after accounting for the changes' effect on costs.

Whether TA-SR would increase or decrease a paper's cover price is not immediately obvious. For it to be rational to lower cover price after introduction of TA-SR, it must be because this reduction causes a greater revenue gain than it would before TA-SR has been introduced.²⁸⁶ Assuming adoption of a profit maximizing cover prices before (and after) the introduction of TA-SR, the effect on cover price turns out to depend largely on the proportion of the newspaper's revenue it receives from advertising as compared to circulation.

The tax-on-advertising portion of the TA-SR proposal reduces the incentive to gain circulation since the advertising tax reduces the advertising revenue from the increased circulation. Generally, the incentive to increase circulation in order to obtain more ad revenue causes cover prices to be lower than they would be to maximize profits from circulation revenue alone. By reducing this incentive for a low cover price, the advertising tax will create an incentive to increase the cover price and this incentive should be stronger the higher the proportion of revenue that previously came from advertising.

The subsidy portion of the TA-SR proposal has more ambiguous effects. The more the paper's revenue had come from ads, the less the paper would have valued a possible increase in circulation revenue from increasing cover price because that would have a proportionately small effect on total revenue. The introduction of the subsidy increases the net effect of an increase in that circulation revenue, thus encouraging an increase in cover price.

²⁸⁶ I assume that lowering the cover price increases circulation, and that advertising revenue is a direct function of circulation; thus, lowering cover price must increase advertising revenue (and increase total variable costs).

In contrast, the more the revenue had initially come from circulation, the less significant advertising revenue will have been as an incentive to avoid higher cover prices as a means to increase revenue. In fact, since the increase in the cover price would have also caused a reduction in total costs due to the reduced marginal costs reflecting the decreased circulation, the only reason that such a paper would not have increased its cover price is that the increase would have caused a decline in total circulation revenue. At equilibrium, a reduction of price for this type of paper would have presumably caused some increase in circulation revenue, but not enough to cover the increased marginal costs. Since the subsidy is a multiplier of the increased circulation revenue resulting from a lowered cover price, the subsidy would create an incentive for a somewhat lower cover price. In this case, the subsidy portion of the TA-SR proposal creates an incentive to decrease the cover price. This effect is dependent on the portion of the paper's revenue coming from advertising being comparatively low—which is likewise the context in which the incentive to raise prices due to the tax portion of the proposal is weakest.

Combining these considerations, the net result of the TA-SR proposal is that the tax tends toward increased cover price, but the subsidy encourages higher cover prices only when the proportion of the paper's revenue coming from ads is sufficiently high. The subsidy creates the opposite incentive—toward lower cover prices—the more the paper's revenue comes from circulation. Hence, TA-SR will lead to an increase in the cover price of some papers and a decrease in cover price of others, with a decrease more likely as a higher portion of the paper's revenue comes from circulation.²⁸⁷

²⁸⁷ Given a few simplifying assumptions, the above can be described mathematically. First, I assume a linear relation between circulation and ad revenue and negative linear relation between cover price and circulation. I adopt as definitions:

p = cover price

n = circulation sales; n is assumed to be a linear function of cover price, $n = n(p)$.

$n(p) = n_1 - n_2 * p$, where:

n_1 = circulation if $p = 0$

n_2 = marginal change in circulation as price changes

$n * p$ = circulation revenue

c_1 = fixed costs

c_2 = marginal cost of each additional paper sold

a = ad revenues and is a function of circulation, $a = a(n)$.

$a(n) = a_2 * n = a_2(n_1 - n_2 * p)$, where:

a_2 = additional ad revenue for each paper sold.

π = profit

The TA-SR program can be evaluated as follows. The program should lead to increased investment in quality and responsiveness to readers. This is a clear gain. The program should also lead to a reduction in the cover price (and expansion of circulation) of papers that are comparatively less dependent on advertising and to cause an increase in price of papers that are more dependent on advertising. The greater circulation and lower price of the more

$$\text{total cost} = c_1 + c_2 * n$$

$$\text{total revenue} = a + np = a(n) + n(p)*p$$

profit = total revenue minus total cost, or:

$$\pi = a(n) + n(p)*p - c_1 - c_2 * n$$

Then tax at rate k , and subsidize at rate s :

$$\pi = (1 - k)*a(n) + (1 + s)*n(p)*p - c_1 - c_2 * n$$

$$\pi = (1 - k)(a_2)(n_1 - n_2 * p) + (1 + s)(n_1 - n_2 p)p - c_1 - c_2(n_1 - n_2 * p)$$

$$\pi = (1 - k)(a_2 * n_1) - c_1 - c_2 * n_1 + p[(1 - k)(-a_2 * n_2) + (1 + s)(n_1) + c_2 n_2] + p^2[(1 + s)(-n_2)]$$

Then take the derivative with respect to price and set equal to 0.

$$0 = (1 - k)(-a_2 * n_2) + (1 + s)(n_1) + c_2 n_2 - 2p[(1 + s)(n_2)]$$

To maximize π , solve for p :

$$p = \frac{a_2 * k}{2(1 + s)} + \frac{c_2 - a_2}{2(1 + s)} + \frac{n_1}{2n_2}$$

In order to find whether the effect of the tax and the subsidy on the profit maximizing price causes the price to go up or down, take the derivative of p with respect to k and then with respect to s . First:

$$\frac{dp}{dk} = \frac{a_2}{2(1 + s)} > 0, \quad \text{therefore the tax causes an increase in the profit maximizing price.}$$

Rearranging terms,

$$p = \frac{c_2 - a_2(1 - k)}{2(1 + s)} + \frac{n_1}{2n_2} \quad \text{and then:}$$

$$\frac{dp}{ds} = \frac{c_2 - a_2(1 - k)}{-2(1 + s)^2} = \frac{a_2(1 - k) - c_2}{2(1 + s)^2}$$

Thus, the subsidy would cause the profit maximizing cover price to decrease if $a_2(1 - k) - c_2 < 0$, and to increase if > 0 . That is, the higher marginal ad revenue (a_2) is in comparison to marginal cost (c_2), the more likely the subsidy would cause an increase in cover price.

Ann Lofaso, Adam Litke, and Reed Shuldiner assisted in this note, although any errors are those of the author.

reader-oriented papers (that is, circulation dependent papers) is also a clear gain. The tendency to make advertising-supported papers more expensive is clearly outweighed by the gains.

Compared to a subsidy on mere quantity of circulation, a subsidy based on circulation revenue more strongly favors increased expenditures on product quality. Since the subsidy on circulation revenue provides benefits both from high price and high circulation, this form of subsidy reduces (but does not eliminate) the incentive to increase circulation merely by reducing price, making quality improvement the comparatively favored strategy. If society benefits (or the press better fills its constitutionally protected function) when the press is 1) more responsive to readers' rather than advertisers' concerns; and 2) financially rewarded for providing people with content for which they will pay (such that papers will invest more in product quality), the preferred form of TA-SR would be to provide a premium for circulation revenue.

An initial objection to this transfer scheme is that it appears elitist. Upscale papers aimed at the affluent often sell for a higher cover price than presumably working class tabloids and would therefore receive a higher subsidy per copy. Moreover, the proposal does nothing to reduce the purchasing advantages the affluent always have because of their wealth. The objection does not consider that a major complaint about advertising is that it values affluent readers more highly and, thus, from an egalitarian perspective, creates a perverse allocation of subsidies. The TA-SR reduces the subsidy advantage that upscale papers normally receive (although the proposal's actual class impact is an empirical question about advertiser's strategic choices). In Reddaway's 1960 study of British national newspapers, a typical "popular" daily received about 52% of its revenue from circulation while the "quality" daily received only 27% from circulation, even though the "quality" sold for 4 *d.* compared to 2 1/2 *d.* for the "popular."²⁸⁸ Thus, the TA-SR proposal would benefit the popular daily rather than the elite paper. It is always possible to argue about which particular papers merit subsidy, but it is hard to reject the principle embodied in the TA-SR proposal. That principle, supporting reader rather than advertiser preferences in the production of media content, conforms to the best democratic visions of press freedom.²⁸⁹

²⁸⁸ See Reddaway, *supra* note 20, at 207.

²⁸⁹ Constitutional protection of the press is presumably justified because it is thought to serve the people (the readers), not as a means to serve advertisers. Of

Given the distributional perversity of advertiser preferences, increasing the significance of people's willingness to pay for the paper usually operates in a distributionally egalitarian manner.

The TA-SR proposal has other desirable qualities. It would help a publication survive without advertising support and serve small groups of readers unwanted by advertisers.²⁹⁰ The proposal would reduce the cost to the paper of exposing advertiser misconduct. It would also reduce the "cost" of being controversial in a manner that alienates some readers who, if the paper were advertising-supported, could use an advertiser boycott to put pressure on the paper to change. More generally, the proposal would promote greater pluralism and diversity in media content by systematically favoring content desired by readers.

Giving greater precision to the TA-SR proposal raises further policy issues. For example, should the proposal apply to "shoppers" or "free sheets" that are presently solely advertiser supported and that are usually most available in more affluent neighborhoods? The question deserves considerable attention but, tentatively, the answer seems "yes".²⁹¹ If it did not apply, the tax/subsidy proposal would encourage advertisers to move to this medium. This shift to "free" papers seems undesirable from the perspective of wanting advertising to support reader-preferred and valued editorial content. If the proposal did apply to the "free" shoppers, it would, of course, disadvantage these papers—some would go out of business and others would reduce editorial expenditures. But if it is correct

course, whether the conclusion that freedom of the press is "for the people" leads to things such as access rights for members of the public to present their views or, alternatively, to protection of the autonomy of the institution, possibly combined with protection of the media professionals, presents a more difficult question of institutional dynamics. See BAKER, *supra* note 11, at 250-71.

²⁹⁰ Newspapers designed for relatively impoverished ethnic or racial groups predictably find obtaining ad revenue difficult and, therefore, would benefit by this type of support. See, e.g., Mary A. Sentman & Patrick S. Washburn, *How Excess Profits Tax Brought Ads to Black Newspaper in World War II*, 64 JOURNALISM Q. 769, 770 (1987). Publications without ads would have the merit of not being beholden to that source of income, which is presumably why E.W. Scripps created an adless newspaper, the *Chicago Day Book*, that lasted six years from its founding in 1911, and was sufficiently successful that Negely Cochran, Scripps' agent in charge, was convinced that it was a practical venture. Scripps had decreed that the paper was to be "the mouthpiece and the friend of the wage-earners who get small wages . . . [and] the poor man's advocate." KENNETH STEWART & JOHN TEBBEL, *MAKERS OF MODERN JOURNALISM* 270-71 (1952).

²⁹¹ Certainly, resistance to the proposal by that portion of the newspaper industry that sells papers to its readers would rightly increase radically if it did not also apply to these "free" papers.

that most serious, reader-oriented journalism occurs in papers sold to readers,²⁹² then the broader coverage supports the values represented by our commitment to a free press.

Whether this proposal should apply only to newspapers or also to magazines, or even more broadly, must be considered. The general argument in favor of promoting the media valued by readers and limiting the influence of advertisers over content is surely applicable to magazines. Applying the proposal to magazines also eliminates the incentive for advertisers to move from newspapers to magazines. More generally, given the desire to support media content, the best version of the TA-SR proposal would probably tax all advertising and promotional expenses, including direct mail, billboards, point of purchase promotions, and corporate public relations expenditure, thereby both reducing advertisers' incentive to leave mass media and raising funds from these other sources to support the mass media.²⁹³

If the proposal applies to both newspapers and magazines, the question arises whether the tax revenue from each category should be combined to form a single subsidy pool or segregated in order to subsidize only other members of that category. The issue is complicated because a single pool would produce some degree of cross-subsidy between quite different types of media that serve somewhat different social functions. A unified program might add simplicity, always a desirable trait in any regulatory or tax scheme, and could reduce or eliminate incentives for publishers to change their format to fit the most profitable category given their publication's own mix of advertising and circulation revenue. Likewise, the unified program could reduce the danger of censorial abuse by state officials in placing publications in one category or the other.

²⁹² Clearly, those shoppers and free weeklies are currently taking advertising away from the paid-for press. The TA-SR proposal, if applied to them, would reduce this effect. Most observers would, I expect, conclude that these media provide relatively little of the reporting and editorial functions that we need from the press. And these papers tend disproportionately to serve more affluent neighborhoods. But neither observation is consistently true—thus, more empirical information about these media is needed before adopting a policy position.

²⁹³ See *infra* notes 313-18 (describing the Swedish system of taxing all advertising to raise the revenue used to support media subsidies).

B. *Alternative Tax and Subsidy Proposals*

Various aspects of the TA-SR proposal can be highlighted by comparing it to other possible tax or subsidy schemes.

1. The Kaldor Proposal

In 1961, the British economist Nicholas Kaldor recommended a tax and subsidy arrangement much like the TA-SR proposal to the British Royal Commission on the Press.²⁹⁴ Kaldor proposed to tax newspapers' advertising revenue and redistribute the proceeds to the newspapers. The tax rate would rise with circulation. The redistribution would rise proportionately with circulation up to a certain "optimum" circulation level, after which no additional circulation subsidy would be provided. Kaldor's scheme, formulated with the circumstances of the British national dailies in mind, was designed to promote competition by encouraging circulation gains up to a certain point but to prevent single paper dominance by discouraging increases in circulation beyond that point.

Three main differences distinguish Kaldor's proposal from the TA-SR plan offered here. First, the subsidy in the TA-SR proposal enhances circulation revenue (per dollar of sales) rather than, as in Kaldor's proposal, rewarding mere circulation (i.e., per copy distributed). The TA-SR subsidy reflects the goal of increasing editorial expenditures and enhancing reader/consumer influence over content, not merely increasing circulation. At the extreme, the goal of merely achieving a higher circulation would justify subsidizing an advertising "free sheet" that has virtually no serious reporting—a result that hardly seems useful. Rather, the more the proposal promotes the existence of papers that use their resources to provide editorial content, the better. Second, the TA-SR proposal taxes advertising at a constant rate: progression is not needed because there is no attempt to limit circulation but only to reward any circulation chosen by readers/consumers. Third, the proposals differ in the manner in which they promote competition. Kaldor's scheme merely places economic obstacles in the way of getting *too* big, combined with incentives for smaller papers to increase their audiences. In contrast, the proposal I offer hopes to increase both competition and diversity by rewarding papers for

²⁹⁴ See ROYAL COMM'N ON THE PRESS, 1961-1962 REPORT 93-95 (1962) [hereinafter ROYAL COMMISSION REPORT].

gaining circulation valued by readers. As long as some readers value content different from that offered by the dominant papers, this proposal rewards a newspaper for satisfying that desire. Thus, the TA-SR proposal encourages the product differentiation²⁹⁵ on which competition in monopolistically competitive industries depends. In other words, it rewards editorial expenditures and product differentiation, and directly empowers consumer/reader preferences more than the Kaldor proposal does.

The reasons the Royal Commission gave for rejecting the Kaldor plan either do not apply or apply with much reduced force to the TA-SR proposal. First, Kaldor's progressive tax applied its high rate to only two identifiable newspapers. The Commission objected that it would force these two papers to adopt a policy of dramatically limiting circulation—behavior that should hardly be encouraged, particularly by government. Second, the Commission objected because the plan created the potential that government might manipulate the variable tax rates to fit the circulation figures of politically favored or disfavored papers.²⁹⁶ The TA-SR proposal excludes variable rates and punishment for circulation increases, and exhibits neither of the specific dangers noted. Still, like the Kaldor proposal, the TA-SR proposal does create the more general danger, implicit in any special legislation relating to the press, of predictable effects on identifiable enterprises. But in the TA-SR proposal, these effects will only occur because of a normatively defended general principle embodied in the proposal, whose specific political implications will not be certain over time.

Finally, the Royal Commission was troubled about forcing some papers (specifically two, although only one paper paid for most of

²⁹⁵ A policy evaluation of product differentiation and resulting competition depends both on normative and empirical considerations. Empirically, product differentiation might merely produce specialized sports and financial papers. Alternatively, it might lead to papers with different editorial and writing styles, different news philosophies, and different partisan commitments. Whether this second type of diversity is socially desirable raises somewhat different normative issues than does the first suggested diversity—questions relating to the desirability of various forms of social conflict and cultural diversity.

²⁹⁶ See ROYAL COMMISSION REPORT, *supra* note 294, at 95.

the transfer) to subsidize their rivals.²⁹⁷ This objection arguably reflected a more general view of at least two of the five members of the Commission. The Commission report stated that the members based their rejection of the scheme on the grounds that "[t]he liberty of the Press includes not only the freedom of a publisher to publish what he wishes but the freedom of the reader to read what he wants, subject only to the ordinary law."²⁹⁸ They found no justification to "distort[] these freedoms and deny[] to some readers the right to buy the newspaper of their choice"²⁹⁹—a consequence that they attributed to Kaldor's proposal. If this concern applies to all governmental interference with the media marketplace, their complaint would be inconsistent with many existing aspects of British and American law.³⁰⁰ On the other hand, if it was a narrower objection to interfering with reader choice, an objection that arguably applies to Kaldor's plan, the objection simply does not apply to the TA-SR proposal. The merit of the TA-SR proposal is that it reduces advertiser influence while increasing reader influence on newspaper content. It is designed precisely to promote the freedom (and opportunity) for readers "to buy the newspaper of their choice" and "to read what [they] want."

2. Progressive Tax on Advertising

Several American media commentators have proposed placing progressive taxes on advertising. In each case, the proposal responded to the commentator's conclusion that newspapers' dependence on advertising revenues was a major cause of the decline in competitive newspaper towns.³⁰¹

²⁹⁷ See *id.* (stating that "[a] statutory levy on two publishers to subsidize their rivals raises difficult issues of principle"); cf. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983) (declaring unconstitutional an ink and paper tax that required tax payments by less than 4% of the paid circulation newspapers in the state and that imposed roughly two-thirds of the total tax burden on one large newspaper).

²⁹⁸ ROYAL COMMISSION REPORT, *supra* note 294, at 98 (emphasis added).

²⁹⁹ *Id.* (emphasis added).

³⁰⁰ See *infra* notes 410-46 and accompanying text.

³⁰¹ See BAGDIKIAN, *supra* note 18, at 230 ("Mass advertising is the engine that drives much of the media into giantism, toward monopoly, toward socially insignificant editorial content, and raises barriers to new media entrepreneurs. A progressive tax on advertising would reverse or slow the present self-feeding process."); Barber, *supra* note 6, at 549-53 ("Thus if local newspaper competition is desirable . . . techniques must be devised that will lessen the impact of the present heavy reliance on advertising as a source of revenue (conceivably this might be done with progressive tax levies on advertising revenue that would tend to reduce sharply

An initial design issue for these proposals is to choose the basis of progressivity. Progressivity could increase directly with amount of advertising revenue,³⁰² with circulation,³⁰³ or with proportion of the entity's revenue that comes from advertising.³⁰⁴ Only the last seems plausible. As long as the law applies to cities of different size, the same amount of advertising revenue or the same circulation corresponds to very different degrees of economic viability. Hence, basing progressivity on the absolute amount of revenue or on circulation makes little sense. In contrast, progressivity that increases the more (proportionately) the paper receives its revenue from advertising rewards a paper for obtaining revenue by satisfying readers and for providing those readers with a product for which they are willing to pay.³⁰⁵

The TA-SR proposal presented above resembles this progressive tax. Without using graduated rates, the TA-SR plan progressively increases the burden on the paper as the proportion of the enterprise's revenue coming from advertising increases. The greater its proportion of revenue that comes from advertising, the larger the newspaper's tax burden compared to its circulation revenue subsidy. Nevertheless, there are three primary objections to this progressive tax proposal, each of which relates to ways it differs from the TA-SR proposal.

the advantages now held by papers of large circulation)."); Humphrey, *supra* note 6, at 951 ("[I]n order to increase newspaper competition, legislation is required which will mitigate reliance upon advertising as the 'staff of life.'").

³⁰² Cf. Humphrey, *supra* note 6, at 952. Humphrey's illustrative plan quickly increased progressivity to 80% of advertising revenue over \$60,000. Often his economic analysis seemed unpersuasive, like his assertion that "it seems doubtful that an increased newspaper cost [to the reader] will substantially affect newspaper sales." *Id.* Still, he was right in his general conclusion that the Newspaper Preservation Act has been ineffective at maintaining competition and that limiting the leading paper's ability to obtain most of the community's advertising revenue is likely to be a more successful way to maintain or create competition. See *id.* at 950-54.

³⁰³ See ROYAL COMMISSION REPORT, *supra* note 294, at 93-95 and accompanying text (Kaldor proposal). Basing progressivity on circulation makes more sense if each market has its own rate table or if the tax significantly affects only a single market (like London's national dailies). This pinpoint regulation, however, also increases the opportunity for manipulation.

³⁰⁴ This appears to be Bagdikian's proposal, although his entire discussion of specifics was that "beyond a certain level of a company's total budget, advertising spending would be subject to a tax that increases with the excess over the limit." BAGDIKIAN, *supra* note 18, at 231.

³⁰⁵ See *id.* at 230-31. This goal, whether or not effectively promoted, is the purported aim of all the tax schemes. See, e.g., Humphrey, *supra* note 6, at 952-53 ("Newspapers would financially depend upon, and have to appeal to, readers who could be attracted by a change in the product, instead of advertisers who could not.").

First, the immediate effect of the progressive tax on advertising is to siphon revenue from the mass media and thereby to reduce the revenue available to support for the press. This result is objectionable even though done for the appropriate purpose of increasing the possibility of competitive papers. In contrast, all revenue generated by the tax in the TA-SR proposal goes to subsidize newspapers valued by readers. By leaving the advertising revenue within the media system, the TA-SR proposal avoids reducing the total media product available to readers.³⁰⁶ The TA-SR proposal should also better promote competition since the subsidy/tax combination more effectively creates a benefit for satisfying diverse reader desires.

These differences lead to the second point, the characterization of each proposal's purpose. The progressive tax on advertising is best described as embodying a desire to suppress, or at least discourage, papers dependent on advertising and the press' receipt of advertising revenue—a restrictive purpose that may be hard to sell either politically or constitutionally. In contrast, the TA-SR plan is an attempt to enhance the role of readers' desires in controlling the type of content produced, a principle perfectly consistent with democratic, market, and free speech values. Any marginal reduction in advertising revenue going to the press is more an unfortunate byproduct of the scheme than a central premise of the TA-SR plan.³⁰⁷ This point is very important. It means that the TA-SR proposal, like the Newspaper Preservation Act, can be viewed as an attempt to enhance the functioning of the press rather than merely to burden it. Such a legitimate purpose should be crucial to the constitutionality as well as the desirability of the scheme.

Third, progressive rates surely invite manipulation and political abuse in the design of the rate structure. However, the danger of abuse decreases as the number of papers covered increases. In short, the danger of manipulation may be reduced if rates are chosen at the national rather than state level. In contrast, the TA-

³⁰⁶ Depending on how broadly the tax applies, the TA-SR proposal could even increase the revenue received by the media. See *supra* notes 292-93 and accompanying text.

³⁰⁷ The TA-SR proposal does not itself take tax revenue out of the system. Still, this proposal will predictably cause some decline in total advertiser expenditures for advertising in the mass media since it effectively increases the cost of that advertising. Also, the administrative costs of the program must be paid either with this tax revenue or out of general tax revenues.

SR proposal uses a flat tax rate and flat subsidy rate, generating a form of progressivity less subject to manipulative abuse.

3. The Swedish Plan

Like the United States, most western democracies have seen a steady decline in newspaper competition. In Sweden, the most newspaper reading country in the world, the total number of papers peaked at about 240 around 1920. After 1950, there was a steady decline from around 210 papers to about 150 in 1970.³⁰⁸ Swedes found this distressing. They view newspapers as a cornerstone of their democratic political culture.³⁰⁹ Moreover, virtually all Swedish papers are associated with one or another of the five parliamentary political parties.³¹⁰ Lack of alternatives in newspapers could undermine political competition.

Swedish analysts concluded that papers failed due to lack of advertising revenue. To be competitive, that is, to get a necessary level of advertising, these analysts found that a paper needed a high penetration in the area of its issuance—it needed subscriptions by at least 50% of the households in order to be indispensable to advertisers.³¹¹ Even some papers with large circulations failed when their readership was spread over too large an area. Preservation of competition required outside support for papers with low household coverage. Further, the support would have to be permanent—or at least last until a paper increased its penetration, which, given market saturation, was often unlikely.³¹²

In 1971, Sweden implemented a “production subsidy,” supported by a tax on advertising, designed to preserve competition.³¹³

³⁰⁸ See KARL-ERIK GUSTAFSSON & STIG HADENIUS, SWEDISH PRESS POLICY 10-11 (1976).

³⁰⁹ See *id.* at 52-59; Goran Hedebro, *Communication Policy in Sweden: An Experiment in State Intervention*, in COMMUNICATION POLICY IN DEVELOPED COUNTRIES 137, 143 (Patricia Edgar & Syed Rahim eds., 1983) (stating that “[m]any groups in the society saw the increasing monopolization of the press as a threat to the democratic processes in the country”).

³¹⁰ See Hedebro, *supra* note 309, at 142 (stating that “the Swedish press has had close ties with the various political parties, and the vast majority declare a political affiliation”).

³¹¹ See GUSTAFSSON & HADENIUS, *supra* note 308, at 63.

³¹² During the first five years of the subsidy program, the competitive situation of newspapers remained relatively stable in the 19 locations where head-on competition existed. See *id.* at 110-12.

³¹³ It also adopted a number of other press subsidies mostly to serve other, related purposes, including encouragement for founding new papers. The production

The subsidy worked—the decline stopped.³¹⁴ The key element of the program is that it provides subsidies only for papers with low coverage in the place of issue.³¹⁵ In addition, to be eligible, normally the paper must carry general news and information, have the character of a newspaper, be published at least once a week, have a minimum circulation, carry less than 50% advertising, and be sold mainly by subscription (an eligibility requirement that excludes the evening tabloids).³¹⁶ The measure for the amount of subsidy is also significant. The subsidy is directly proportional to the amount of newsprint devoted to editorial copy.³¹⁷ This criterion excludes support for advertising content; instead, it varies directly with increases in circulation and with increases in space devoted to editorial content. Finally, although the commentary seems not to count this as a policy merit, the subsidy is supported by a 10% tax on general advertising, which is reduced to 3% for newspaper advertising.³¹⁸

The Swedish plan has obvious merit—it appears to have sustained competition. It also bears important similarities to the TA-SR plan recommended here. Both the Swedish selective productions subsidies and the TA-SR proposal recognize that newspapers' dependence on advertising is a key threat to the maintenance of competition in the existing market environment. Both use an allocation criterion that avoids direct support of advertising and that, in different ways, rewards emphasis on editorial content. The Swedes' newspaper subsidy rewards increased editorial content directly; TA-SR's subsidy of circulation

subsidy is the largest in amount and is the one most directly aimed at preserving competition. See Karl-Erik Gustafsson, *The Press Subsidies of Sweden: A Decade of Experiment*, in *NEWSPAPERS AND DEMOCRACY* 104, 110-12 (Anthony Smith ed., 1980).

³¹⁴ Apparently, no "secondary paper," that is, the weaker paper in a competitive situation, closed during the 1970s; many increased their circulation. See Hedebrö, *supra* note 309, at 143.

³¹⁵ The definition of "low coverage" varied somewhat depending on the type of paper: less than 50% penetration for four to seven day a week papers with circulation of more than 10,000, less than 60% for similar papers with lower circulation, and less than 30% for 1-3 day a week papers. See GUSTAFSSON & HADENIUS, *supra* note 308, at 83.

³¹⁶ See *id.* at 82-83.

³¹⁷ See *id.* at 84. There are also minimum and maximum subsidy payments for papers in various categories and a standard amount for low periodicity papers. See Gustafsson, *supra* note 313, at 111. The rate of subsidy has steadily increased since 1971; in 1979, the government gave an additional increase in the rate of support for papers with especially low coverage (less than 21%). See *id.*

³¹⁸ See 2 *WORLD PRESS ENCYCLOPEDIA*, *supra* note 18, at 836; Hedebrö, *supra* note 309, at 143.

revenue rewards satisfaction of reader, money-backed preferences. Likewise, by financing the subsidy with a tax on advertising, both plans at least marginally decrease the role of advertising in newspapers' finances.³¹⁹ Swedish commentators note that the weak papers in Sweden would "prefer a pricing policy by which the greater share of revenues were derived from the circulation market . . . [but were] unable to alter newspaper pricing policy on their own."³²⁰ Like the TA-SR proposal, the effect of the Swedish advertising tax and its method of allocating subsidies was to decrease the role of advertising in all papers' financing (given the tax), and especially in weak papers (given the subsidy).

Still, there are significant differences between the two proposals, and these differences indicate why the TA-SR plan proposed here is preferable, at least for the United States. The Swedes developed their plan for the limited purpose of maintaining competition that otherwise was undermined by newspapers' overwhelming dependence on advertising. Thus, only papers whose lack of market penetration resulted in inadequate advertising revenue received subsidies. The Swedish subsidy is not designed to discourage an advertising focus nor to provide an incentive for greater emphasis on responding to readers' interests. In contrast, the TA-SR plan is designed to change a paper's financial calculations to be less directed at serving advertisers and more aimed at serving readers. For this reason, the TA-SR plan provides the subsidy to all circulation-revenue producing papers rather than to only particularly endangered papers. It changes the market dynamics for all papers, thereby promoting a general reorientation of the press. This structural change implements a more principled goal. Rather than trying to save a few unsuccessful, competitive papers within an otherwise accepted market environment, the TA-SR proposal tries to create a different market environment that is more hospitable to the purposes of a free and democratic press. Within that improved environment, TA-SR allows papers to succeed or fail on their own.

Other differences follow from this initial difference between the narrow purpose of the Swedish program and the broader aim of the TA-SR proposal. In the TA-SR proposal, most elements follow mechanically once the tax rate is set. In contrast, the Swedish

³¹⁹ However, the Swedish subsidy was not specifically defended on this ground, but rather for its role in supporting papers that were predicted to be unable to obtain sufficient advertising support.

³²⁰ GUSTAFSSON & HADENIUS, *supra* note 308, at 70.

subsidy program is quite complex, requiring numerous additional decisions and using different subsidy criteria depending on the paper's penetration rate,³²¹ circulation size, and publication schedule. Those designing the Swedish program were conscious of the vital need to make the grant process as objective as possible in order to prevent political manipulation of the press, and the Swedes apparently believe that they succeeded.³²²

Nevertheless, the scheme's complexity clearly holds the potential for partisan design of threshold amounts and therefore appears more subject to political manipulation. Although virtually no evidence suggests that partisan manipulation has occurred, or even that opponents have charged that it has occurred, the distribution of subsidies is interesting. The Social-Democrats (the socialists) are generally supported by 40% to 50% of the electorate and are the largest parliamentary party,³²³ although only about 16% (by circulation) of the press is affiliated with them, as compared to about 73% affiliated with the bourgeois parties.³²⁴ Of the five parliamentary parties, the Social-Democrats pushed the longest and hardest for subsidies in the media marketplace³²⁵—and Social-Democratic papers have received 55% of the subsidies.³²⁶

Thus, despite the proven usefulness of the Swedish program, the TA-SR proposal embodies a more basic and general principle of promoting readers' preferences over those of advertisers. It attempts to create a better environment for a free and democratic press, but then lets papers succeed or fail on their own. This more general, principled goal also suggests a simpler plan that arguably has less potential for political manipulation.

³²¹ Sweden gives papers with particularly low penetration rates especially high subsidies and also provides for differently sized subsidies in unique situations. One might argue, however, that if these papers cannot stimulate a reasonable circulation or overcome their unique problems, they should be allowed to fail.

³²² See, e.g., Gustafsson, *supra* note 313, at 107, 121-22.

³²³ A nonsocialist party came to power in 1976, but press subsidies continued and, in fact, increased. See *id.* at 111, 113.

³²⁴ See GUSTAFSSON & HADENIUS, *supra* note 308, at 10; 2 WORLD PRESS ENCYCLOPEDIA, *supra* note 18, at 828; Hedebro, *supra* note 309, at 142.

³²⁵ See Gustafsson, *supra* note 313, at 112-13.

³²⁶ See GUSTAFSSON & HADENIUS, *supra* note 308, at 105. Given the premise that competition is valuable, this result should be expected and accepted since the socialist press in most places was the secondary paper and, despite its electoral power, almost everywhere its papers were in danger of closing.

4. Proposed Revenue-Oriented Media Taxes

With occasional exceptions like Huey Long's "tax on lying" that was carefully designed to apply only to the opposition press in Louisiana,³²⁷ raising revenue is the primary purpose of most modern taxes on advertising or on the press. In response to continuing budget crises, legislative bodies increasingly eye these major economic activities as potential sources of tax revenue.³²⁸ Florida recently adopted, but then quickly repealed, legislation that applied its sales tax to advertising; at least twenty-one states are considering or have recently considered doing so.³²⁹

These tax revenue proposals generally take one of four forms: 1) they apply the state's sales (or use) taxes to previously exempt publications; 2) they apply the sales tax to advertising, often as part of an extension of the sales tax to a broad range of services; 3) they reduce income tax deductibility of advertising by treating it, for example, as a capital expense and requiring that it be amortized;³³⁰ 4) they deny (or reduce) income tax deductibility of advertising for specific, usually harmful, products like tobacco or alcohol.³³¹ Of these, the fourth type, related to discouraging promotion of specific products, raises a policy issue that is beyond the scope of this paper; the third, although economically complex and theoretically interesting,³³² creates basically the same type of

³²⁷ See *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (describing the circumstances of the tax invalidated in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)).

³²⁸ See *Ad Industry Mobilizing Against Proposed New Taxes*, COMM. DAILY, Aug. 30, 1990, at 3; Steven W. Colford, *Ad Groups Mobilize as 6 States Mull Taxes*, ADVERTISING AGE, Mar. 11, 1991, at 3.

³²⁹ See Steven M. Cohen, Note, *A Tax on Advertising: First Amendment and Commerce Clause Implications*, 63 N.Y.U. L. REV. 810, 810-11 (1988).

³³⁰ In 1990, the Bush administration proposed, at the last minute, that 20% of advertising expenditures not be immediately deducted but instead be amortized over four years, a proposal the Congressional Budget Office estimated would raise \$15.3 billion over five years. See Steven W. Colford & Julie Liesse, *Marketers Dodge Bush Tax Bullet*, ADVERTISING AGE, Oct. 29, 1990, at 1. Scholars have objected to making advertising deductible, rather than capitalized and depreciated, on various grounds including the loss of tax revenue and the undesirable consequence of favoring investment in intangibles as opposed to tangible capital. See George Murdock, *Taxation of Business Intangible Capital*, 135 U. PA. L. REV. 1179 (1987); Lawrence Summers, *A Few Good Taxes: Revenues Without Tears*, NEW REPUBLIC, Nov. 30, 1987, at 14.

³³¹ See, e.g., *AAF to Take Offensive in Battles Against Ad Restrictions*, COMM. DAILY, Mar. 13, 1991, at 3 (noting that more than 30 proposals have been offered in Congress to restrict or tax advertising for specific products like tobacco or alcohol).

³³² Rather than relating to an immediate sale, much advertising can be viewed as

consequences for the media as the second, and therefore will not be specifically considered.

Both the media and advertising agencies vehemently, and usually effectively, oppose these taxes.³³³ The American Advertising Federation claims credit for helping defeat proposals in twelve states to tax advertising in 1990,³³⁴ trumpeting the ad industry's "reputation of fighting and winning fights."³³⁵ Advertising agencies even plan to launch a major advertising (and public relations) campaign to convince the public of the social value of advertising.³³⁶

State newspaper associations have also been relatively successful at getting exemptions for their product. Only nine of the approximately forty-four states with sales taxes apply them to newspapers.³³⁷ Still, these exemptions are not safe. For example, with the support of the Democratic leadership, Republican Governor

an investment in the future—as an attempt to create "good will." The effect of treating it as a capital rather than a current expenditure is to make advertising more expensive and to raise tax revenues.

³³³ See Colford, *supra* note 328, at 3.

³³⁴ See *AAF to Take Offensive in Battles Against Ad Restrictions*, *supra* note 331, at 3. Two states, New Jersey recently and Oklahoma for several decades, have taxed telephone yellow page advertising, with a constitutional challenge to the New Jersey law threatened. See Steven W. Colford, *A Taxing Situation*, ADVERTISING AGE, Mar. 18, 1991, at S-12; Steven W. Colford, *Yellow Pages Group to Fight N.J. Ad Tax*, ADVERTISING AGE, Oct. 22, 1990, at 2.

³³⁵ Colford, *A Taxing Situation*, *supra* note 334, at S-12.

³³⁶ See *Ad Industry Mobilizing Against Proposed New Taxes*, *supra* note 328, at 3; *AAF To Take Offensive in Battles Against Ad Restrictions*, *supra* note 331, at 3. The ad industry presents a well developed set of arguments against these taxes, arguing, for example, that these taxes will "choke [advertising] and the economy it fuels," and suggesting that Florida's short-lived tax resulted in "economic devastation" to industry and state. *Id.* (quoting AAF president Howard Bell).

³³⁷ See Alex S. Jones, *Ruling Adds to Uncertainty on Newspaper Sales Taxes*, N.Y. TIMES, Sept. 24, 1990, at D12. In 13 states, the sales tax applies to magazines, setting up in some states the potential for constitutional challenges to differential treatment of newspapers and magazines. See, e.g., *Department of Revenue v. Magazine Publishers of Am.*, 565 So. 2d 1304, 1310 (Fla. 1990) (holding it unconstitutional to apply sales tax to magazines while exempting newspapers; rather than extend the exemption to magazines, the court invalidated newspapers' exemption), *vacated*, 111 S. Ct. 1614 (1991); *Southern Living v. Celauro*, 789 S.W.2d 251, 252 (Tenn. 1990) (holding the application of sales tax to magazines but not newspapers unconstitutional), *cert. denied*, 111 S. Ct. 1693 (1991). But see *Hearst Corp. v. Iowa Dep't of Revenue & Fin.*, 461 N.W.2d 295, 302-03 (Iowa 1990) (upholding differential tax treatment of newspapers and magazines), *cert. denied*, 111 S. Ct. 1639 (1991). The reasoning of most cases invalidating the differential treatment seems contrary to that of the Supreme Court in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), which upheld the application of a state sales tax to cable television subscriptions while exempting the print media. Therefore, these differences are likely to be upheld in the future.

Pete Wilson got California to extend sales tax to various items including newspapers.³³⁸

Although understandable as states scramble for tax revenue, application of the sales tax to newspapers or magazines is undesirable from the perspective of a democratic press. Sales taxes reduce both media revenue and reader influence over the media. States that exempt newspapers and magazines from sales tax act in a manner supportive of First Amendment values, while taxes like Governor Wilson's move in precisely the wrong direction.

On the other hand, application of a sales tax to advertising would have some beneficial effects for a free press. It would marginally reduce the influence of advertisers on press content. By increasing the role of circulation revenue, the tax on advertising should encourage product differentiation and diversity in the media, and correspondingly have some tendency to encourage competitive media offerings. The primary problem with the tax, from the perspective of the press,³³⁹ is that it takes some income from the press. In this respect, the TA-SR proposal is preferable. Not only does it not take the advertising revenue away from the press,³⁴⁰ it further intensifies the influence of readers by making all revenue obtained from readers increasingly valuable to the newspaper.

The merit of taxing advertising rather than readers' purchases has been recognized elsewhere. In Europe, the press commonly receives tax exemptions and other subsidies.³⁴¹ The sale of newspapers are normally exempt from the Europeans' value added tax (VAT)—an exemption similar to typical sales tax exemptions here. Nevertheless, most European countries apply their VAT to advertising in the press.³⁴² The policy implications of the analysis

³³⁸ See Robert B. Gunnison & Greg Lucas, *Governor Signs Bills Increasing Taxes \$51 Billion*, S.F. CHRON., July 1, 1991, at A1; Robert Reinhold, *California Inches Toward Closing Big Budget Gap*, N.Y. TIMES, June 21, 1991, at A16.

³³⁹ I do not consider issues relating to the increase in the cost of advertising. If we presently have too much advertising, then this effect also may be desirable, but that issue requires an analysis not offered in this article.

³⁴⁰ That is, the portion of the advertising expenditures paid as a tax is not taken from the press since it is returned as a subsidy. The tax's effect of increasing the price of advertising and, hence, of causing a decline in purchases and in total advertising expenditures would result in some reduction of advertising revenue going to the press.

³⁴¹ See ROYAL COMMISSION, *supra* note 9, at 93-104; ANTHONY SMITH, *NEWSPAPERS AND DEMOCRACY* 91-93 (1980); Robert G. Picard, *Levels of State Intervention in the Western Press*, MASS COMM. REV., Winter/Spring 1984, at 27.

³⁴² According to the study by the British Royal Commission, in the twelve (Western European) countries that had VAT, every country except the U.K. applied

in this article conform to the European practice. The sales of newspapers and periodicals ought to be exempted from sales taxes. If taxes are to be applied, they should be on the advertising.³⁴³

C. *Combating Advertisers' Censorship*

Advertisers, not governments, are the primary censors of media content in the United States today.³⁴⁴ Advertisers effectively restrict the circulation of media content that they do not like and are even able to get content that they like to appear as non-advertising content. The direct legal response would be to prohibit advertisers' exercise of influence, but this is easier said than done. Law has never been very effective in preventing bargaining parties from reaching outcomes that the parties find optimal. Black or grey markets in drugs, sex, or rationed consumer goods—or here, in influence over media content—result. Rent control drives owners' attempt to extract value from renters underground: owners skimp on up-keep or services, exact special payments, etc., in order to effectively charge closer to market rates. Economists show that attempts to prevent market exchanges that the parties find optimal are partially circumvented, with the parties' coping behavior often causing a waste of resources.

Complaints about resources wasted in coping apply mostly when the regulation tries to change behavior in order to redistribute wealth (of a particular sort) from one contracting party to the other. But in the case of prohibiting advertiser influence on media content, the intended behavioral change is unrelated to redistributing wealth between advertisers and media enterprises. Rather, the goal is to prevent their achieving a particular type of result. As with

their value added tax to advertising in the press, although the Irish Republic, Luxembourg, and the Netherlands applied it at reduced rate. The standard VAT rate in these eleven countries ranged from 11% to 20%. The rate applied to advertising ranged from 4% to 20%. No country, however, applied the full VAT to newspaper sales, and most did not apply it at all. See ROYAL COMMISSION, *supra* note 9, at 108 tbl. C.4. Thus, these countries exhibited policies corresponding to those suggested by this paper: although the media serve the public good and, therefore, are properly encouraged by tax exemptions, advertising interferes with press freedom and should be discouraged, for example, by taxation.

³⁴³ California is compounding its error by now exempting advertising-supported "free papers" from its recent extension of the sales tax to newspapers and periodicals. See Carl Ingram & Jerry Gillam, *Senate Approves Bill Requiring Teaching of AIDS Prevention*, L.A. TIMES, Sept. 13, 1991, at A3, A29.

³⁴⁴ Perhaps it should be said that advertisers are second after the media itself, which engages in self-censorship for both good and bad reasons.

antitrust legislation, making achievement of the parties' aim more costly is a central goal of the regulation. These costs partially deter the unwanted behavior by making it somewhat more difficult and more expensive to purchase influence over non-advertising content. With this in mind, I will consider legislative responses related to three areas of advertisers' censorship, moving roughly from the more easily justified to the most controversial forms of regulation.

1. Prohibiting Advertiser Censorship

First, advertisers sometimes block communications. Tobacco companies prevent reports on the dangers of smoking by threatening withdrawal of advertising. Revlon retaliates against *Ms.* for publishing a front cover picture of Soviet feminists who were not wearing make-up.³⁴⁵ Proctor & Gamble effectively deters broadcasts of a criticism of its purchase of El Salvadoran coffee, retaliating against a station that breaks rank.³⁴⁶

This censorship by advertisers merely reduces the perspectives and information available to the public while increasing the media's slant toward commercial values. Legislation should outlaw an advertiser's attempts to use its economic relationships with a media enterprise to influence the enterprise not to print or broadcast content that it would otherwise choose to present.³⁴⁷ There is little reason to allow this use of power to censor other's speech and to block the public's access to information or viewpoints.³⁴⁸

³⁴⁵ See *supra* text accompanying note 179.

³⁴⁶ See *supra* text accompanying notes 180-84.

³⁴⁷ I leave aside the important issues of whether the prohibitions discussed in this section should be enforced by criminal or civil law, and if by civil law, who should be potential plaintiffs—the state, the media enterprise, censored authors or producers, injured members of the public acting as private attorney generals—and what should be the measure of damages. The advertiser's restraint on media freedom resembles corporate agreements that restrain trade. The antitrust laws may provide useful analogies for determining appropriate remedies and potential plaintiffs.

³⁴⁸ Occasionally, communications to which the advertiser objects are demonstrably false. This is not a reason, however, to give advertisers censorship powers that others, without such economic leverage, do not have. Instead, the advertiser should communicate the true information to the media enterprise. This presentation will usually suffice to get the media to cease presenting the false material. The media enterprise, however, sometimes will still have an economic or ideological reason to continue presenting the false information. Putting aside whether the advertiser would have a tort remedy against the media for its knowingly or recklessly false presentation, this scenario is sufficiently unlikely, as compared to cases of advertisers abuse of power, that its possibility does not justify permitting advertisers to use their economic power to "censor" the media.

It will often be difficult to prove that subtle retaliatory behavior by advertisers was a response to disliked content. Without incriminating statements by Revlon, *Ms.* would be unable to prove a legal violation. When the media "knows" what it cannot prove, the advertiser will have circumvented application of the legal rules while effectively applying pressure on the media. Still, overt cancellation of all tobacco advertising after a story on the dangers of smoking should constitute a *prima facie* legal case. Likewise, Proctor & Gamble would not be able to publicly announce its threat to withdraw advertising from stations that broadcast a particular item. Although too much should not be expected, this prohibition would formalize the norm of non-influence and could operate marginally to change advertisers' behavior, thereby making the press marginally "freer."

2. Prohibiting Attempts to Control or Influence Non-Advertising Content

A general prohibition of advertisers' influence over non-advertising content might initially seem a straightforward proposition, but such a complete prohibition would be neither feasible nor desirable. Advertiser influence is so built into the market context that not only can it often not be easily proven, but frequently it occurs without any act of the advertiser inducing it, sometimes even without the advertiser wanting it.

The lead sentence of the *New York Times's* story about the dismissal of Gabriel Rotello, the editor and founder of the gay and lesbian magazine *Outweek*, asserted that the magazine had been trying to attract "mainstream advertisers."³⁴⁹ Rotello said he was dismissed because the publisher wanted *Outweek* to be less political, noting "resistance by advertisers who do not want to be in a journal that reflects the political values that they do not subscribe to."³⁵⁰ Both the firing and the move to being less political appeared to be attributable to advertisers' influence.³⁵¹ Proving it, however,

³⁴⁹ See Deirdre Carmody, *Outweek, in a Shake-up, Ousts Its Editor*, N.Y. TIMES, June 10, 1991, at D10.

³⁵⁰ *Id.*

³⁵¹ Contrarily, some people at the "strident" magazine attribute *Outweek's* subsequent closure to "infighting among its editors and poor management." Deirdre Carmody, *Gay, Lesbian Press Is Starting to Emerge into the Mainstream*, N.Y. TIMES, Mar. 2, 1992, at A1. Still, after suggesting that the currently emerging new gay press had "got[ten] away from offending mainstream sensibilities," Doug Allgood, vice president of special markets for the ad agency BBDO, asserted "[t]hat had to happen

would be more difficult. The publisher of *Outweek* explained that he dismissed Rotello because the magazine was getting stale. Even if it could be shown that the publisher fired Rotello in order to change the magazine in a way that would please advertisers, this may have merely represented the publisher's own judgment about what would attract advertisers without any advertiser ever suggesting that the magazine should change—or even wanting it to. If advertisers had avoided the magazine because of its political orientation, that does not necessarily mean they attempted to change it. If readers can favor magazines whose values they respect, it might be asked what is objectionable about advertisers doing likewise.³⁵² Advertisers' patronage of magazines they like does not constitute a conscious attempt to exercise influence.³⁵³ It may be unreasonable to require them to patronize publications with which they disagree.³⁵⁴

Whatever the real reasons for Calvin Klein's placement of its very large, unconventional, 116-page "polybagged outsert" (ad supplement) in the October 1991 issue of *Vanity Fair*—Calvin Klein said it was because *Vanity Fair* was "the hot book"—the *New York Times*'s story reporting the placement noted that in 1987 *Vanity Fair* had published an "adulatory cover story" about Mr. Klein and his wife.³⁵⁵ This comment in the *Times* (or the predictable industry

before the advertisers could take the medium seriously." *Id.*

³⁵² This question can be answered—and the answer would track the arguments for limiting corporate involvement in political campaigns and rejecting the constitutional status of commercial associational rights. The proper interest of commercial advertisers should be seen as *only* their interest in communicating their commercial message to the public. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 805-08 (1978) (White, J., dissenting); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981).

³⁵³ Compare the illegal gratuities statute, stating that any "public official, . . . [who] otherwise than as provided by law for the proper discharge of official duty, directly or indirectly . . . receives . . . anything of value personally for or because of any official act performed or to be performed by [him]" is guilty of accepting an illegal gratuity. See 18 U.S.C. § 201(c)(1)(B) (1988). To whom and why would one make campaign contributions if not "for or because" of what the person has done or has promised to do?

³⁵⁴ The British Labour Party for a while supported a proposal to treat newspapers' advertising revenues as a common pool to be distributed on a basis other than advertisers' choice of the media enterprises in which to advertise. This would remove the ideological control that the advertisers exercise over the press. See James Curran, *The Different Approaches to Media Reform*, in BENDING REALITY: THE STATE OF THE MEDIA 89, 107, 112 (James Curran et al. eds., 1986).

³⁵⁵ See Stuart Elliot, *Calvin Klein Redefines the Big Buy*, N.Y. TIMES, Aug. 28, 1991,

gossip to the same effect) inevitably sends a strong message to other magazines about the type of stories that will eventually turn out to have been wise—that is, profitable. None of these events—the original *Vanity Fair* story, the placement of the supplement, or the *Times*'s story—necessarily involve any objectionable behavior, but the overall effect increases the sway of advertising over content. The press is simply not as free to serve its constitutionally valued functions if the need to please present or potential advertisers significantly influences its choice of what figures to dramatize and what stories to report.

These examples illustrate influence that is not only virtually impossible to prove but also possibly unintentional, the influence being virtually built into the structure of interaction. In these circumstances, advertisers presumably should not be held legally responsible. But even advertisers' intentional attempts to influence non-advertising content are incredibly varied in nature and offensiveness. As a sampling, consider: (1) general public campaigns in which businesses (as well as others) advocate generally improved quality of media or improved presentation of particular issues; (2) public relations and information campaigns about the business itself or its products, such as Proctor & Gamble's attempt to provide what it considered accurate information about its coffee purchases or about the origins of its corporate logo;³⁵⁶ (3) "infomercials," usually program length programs with format designed to imitate regular television programming but created by the advertiser and intended to promote the advertiser's products; (4) "product placements,"³⁵⁷ that is, payment to programming producers to include branded products in a movie or video programming;³⁵⁸ (5) use of leverage as an advertiser to influence

at D5.

³⁵⁶ These public relation campaigns can involve press releases, which newspapers often print without significant editing, and PR-produced videos designed so that they can be, as they often are, broadcast on news programs without significant editing.

³⁵⁷ See generally Mark C. Miller, *End of Story*, in *SEEING THROUGH MOVIES* 186-246 (Mark C. Miller ed., 1990) (describing the prominence of product placement in movies and critiquing the effect of this form of commercialism on movie content). Product placements, reportedly costing from \$10,000 and up, apparently increased dramatically after sales of "Reeses Pieces" rose 70% following their appearance in the movie "E.T." See Randall Rothenberg, *Critics Seek F.T.C Action On Products as Movie Stars*, N.Y. TIMES, May 31, 1991, at D1. Product placements may be increasing in TV, where they have long been prominent in some countries, especially in Brazilian soaps. See Julia Michaels, *Will We Be Seeing J.R. Plugging Goods on "Dallas" Soon?*, WALL ST. J., Jan. 4, 1989, at B4.

³⁵⁸ Both infomercials and product placements could be considered *advertising*

programming on which its advertising will appear; and (6) use of this leverage to influence programming on which the firm does not advertise.

Of the types of influence listed above, arguably only those where the advertiser uses its economic power—payments or threats to end paying relationships (advertising)—are objectionable. Even this focus is not self-interpreting. When the firm supplies the media with “free” videos or press releases, it uses economic resources to influence media content.³⁵⁹ From the media’s perspective, this is as good as if the firm gave it money to cover the expenses of writing or taping a favorable report on the firm or its products. The newspaper prints the press release rather than hire a reporter and writer. The nightly news does not bother to announce that its report on nuclear power is comprised solely of a video given to it by a local utility company. The networks did not announce that much of their video material of events in Kuwait during the period leading up to our invasion was supplied by a Washington-based public relations firm indirectly paid by the Emir of Kuwait.³⁶⁰ Nor were the networks able to note that many of these videos, which they broadcast, presented “outright misinformation”—like videos purportedly but falsely showing Iraqi troops firing on peaceful Kuwaiti demonstrators.³⁶¹

Although the FCC requires that broadcasters identify all commercial sponsors, in a controversial decision, it declared that this did not apply when a station broadcasts a “program” supplied by a toy manufacturer featuring one of the company’s toys because

content but, to the extent that their origin is not identified, they are presented to the public as non-advertising content. Thus, product placements can be considered as advertiser control of the media’s non-advertising content.

³⁵⁹ Advertisers and their public relations firms carefully prepared and offered to newscasters about 4000 video news releases (“VNRs”) in 1991. The same feature—obtaining access to the media and, as news, being more believable than paid commercials—both creates the VNR’s appeal to their corporate or political sponsors and makes them objectionable from the perspective of free press. First, well made, “picture rich” VNRs effectively can chase out of the nightly news more important stories that are “picture-poor” and for the stations more expensive. Second, to the extent that their source is not identified, VNRs are implicitly deceptive. Nevertheless, “[r]oughly 80 percent of the country’s [television] news directors acknowledge [using the] material at least several times a month”—and predictions are that reliance on VNRs by news departments will increase. See David Lieberman, *Fake News*, TV GUIDE, Feb. 22, 1992, at 10, 16.

³⁶⁰ See Morgan Strong, *Portions of the Gulf War Were Brought to You by . . . the Folks at Hill and Knowlton*, TV GUIDE, Feb. 22, 1992, at 11, 12.

³⁶¹ *Id.* at 13.

the station "paid" for the program by giving the toy producer two minutes of advertising time during other children's programming.³⁶² Even though it neither directly pays the station for influence nor threatens withdrawal of advertising, the advertiser is able to use its economic resources to provide the media with something the media values and thereby successfully influences the station's broadcasts.

Advertiser influence is an incredibly complex phenomenon that is unlikely to be wisely regulated with general principles or all-encompassing rules. Still, I propose two responses. First, an advertiser's use of actual or implied threats of withdrawal of advertising (or promises to advertise) in order to influence media content generally reduces pluralism and diversity or amplifies already dominant perspectives. It should therefore be prohibited.³⁶³ This prohibition merely extends the earlier proposal to prohibit advertisers from using their economic power to censor content to which they object.

Second, the law should require that any content that an enterprise pays to influence should identify the firm as an advertiser or sponsor.³⁶⁴ Surely, some payments for influence should be

³⁶² See *National Ass'n for Better Broadcasting v. FCC*, No. 89-1462, 1990 U.S. App. LEXIS 8517 (D.C. Cir. May 22, 1990) (upholding, in an unpublished opinion, the FCC decision after remand); *National Ass'n for Better Broadcasting v. FCC*, 830 F.2d 270, 278 (D.C. Cir. 1987) (reversing and remanding FCC's original dismissal of complaint).

³⁶³ Whether this prohibition should apply to the content of programming "sponsored" by the advertiser is more debatable; I will argue below that it should.

³⁶⁴ Just as the ethics of implicitly deceptive "reading notices" were debated at the turn of the century, the merit of broadcasting "infomercials" is controversial today. A National Association of Television Program Executives survey of commercial television executives (859 surveyed, 281 responded) found that 60% thought "infomercials" were bad for television, while reportedly only 6% thought there was anything good about them. Still, the infomercials provided a significant portion of most stations revenues. See Robert Epstein, *Prime-Time Invasion of the Infomercials*, L.A. TIMES, Jan. 14, 1991, at F1.

Regulation of infomercials and product placements might be collectively beneficial to broadcasters as well as to the public. At the turn of the century, many leading publishers concluded that they would suffer economic injury from exposure that they published reading notices; these publishers opposed publication of reading notices at least in part for that commercial reason. The same may be true today. Not only have leading producers of "infomercials" attempted self-regulation that requires clear identification of sponsorship, but apparently some station executives worry that when the public, which thinks it is watching a noncommercial program, "then wakes up to what is being pitched, the station's image and business can be hurt." *Id.* at F9. Since the injury of exposure is likely to be partially "externalized," that is, likely to discredit the medium generally, legal regulation could solve the "public good"

banned,³⁶⁵ but I will not pursue those possibilities here. Since the requirement of identification could apply in quite diverse and changing contexts, an agency, possibly the FTC, should develop specific rules. Existing laws already embody the identification principle. This proposal merely carries those rules a slight step further.

Paid product placements are essentially the same thing as the paid "reading notices" that appeared in newspapers around the turn of the century: both present a message or image chosen by an advertiser in a context designed to mislead the public about the advertiser's control of the content. In addition, both practices implicitly suggest to the public that media professionals, journalists or program creators and directors, formulated the communication for their own professional or artistic reasons. "Reading notices" were effectively outlawed by the 1912 Act that denied second class postage rates to periodicals that did not clearly identify the inserts as advertisements. Prohibition of unidentified "product placements" merely applies this rule to the broadcast media. An appropriate rule would be to require an announcement that the inclusion of particular products constitutes a paid advertisement at the beginning and end of a video program, or as a subtitle at the time the product appears. A similar requirement should also apply to program-length commercials. This is arguably already required by the FCC's rules requiring sponsor identification.³⁶⁶ The public would also be served by a requirement that news programs' broadcasts of video provided by corporate public relations departments include written subtitles during the broadcast identifying the corporate source.³⁶⁷ The social interest arguing against identifica-

problem.

³⁶⁵ Without identification of material as advertiser sponsored, many of these practices could be treated as a "misleading" trade practice, already illegal and subject to FTC control. See Rothenberg, *supra* note 357, at D1. The Center for the Study of Commercialism announced it would petition the FTC to reach this conclusion. Likewise, product placements of cigarettes in movies arguably require health warnings and, if broadcast, violate the ban on cigarette advertising on television. With these problems in mind, the tobacco industry informed the FTC that it would cease buying placements in films. See *id.* at D5

³⁶⁶ See 47 U.S.C. § 317 (1988) (requiring identification); 47 C.F.R. § 73.1212 (1991) (requiring broadcasting sponsorship identification); 47 C.F.R. § 76.221 (1991) (requiring cable origination programming sponsorship identification).

The payments to play particular songs on the radio, which produced the "payola" scandals of the 1950s and the Congressional and FCC rulemaking responses, were merely versions of "product placements." See DOUGLAS H. GINSBURG, REGULATION OF BROADCASTING 1-7 (1979).

³⁶⁷ This proposal hardly seems radical. The Editors of TV Guide recommend that

tion of the commercial source of information is difficult to imagine.³⁶⁸

On the other hand, other practices arguably should escape coverage. "Paid-for copy" is not equivalent to even conscious, intentional use of economic power in the form of promises concerning advertisements as a means to exercise of influence. Would the 1912 Act, or should the proposal advanced here, require identification if advertisers demand to see the editorial content of a special environmental supplement before deciding whether to advertise in it—or if they suggest something about the supplement's appropriate content?³⁶⁹ Presumably the 1912 Act does not, even though such influence does undermine editorial independence. If an identification requirement led newspapers and periodicals to hold the line against advertisers' demands for pre-publication review, such an application would be desirable. Nevertheless, the real issue here is probably not identification, but whether these forms of advertiser influence should be, and can effectively be, prohibited.

"[w]hen a TV news organization includes film or tape prepared by an outside source in a broadcast, the label "VIDEO SUPPLIED BY [COMPANY OR GROUP NAME]" be visible for as long as the material is on-screen." TV GUIDE, Feb. 22, 1992, at 26.

³⁶⁸ The right to anonymously communicate information, persuasively elaborated in *Talley v. California*, 362 U.S. 60, 64-65 (1960) and *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100-02 (1982), is generally assumed not to apply to commercial communications. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). While invalidating various informational-oriented regulations, the Court distinguished charitable solicitors from commercial speakers. This was apparently crucial since the Court noted that the overbreadth doctrine is inapplicable in various commercial speech contexts, and then held the regulation of the charitable solicitors to be unconstitutionally overbroad. See *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638-39 (1980).

³⁶⁹ *The New Yorker* commissioned a well respected environmental author, John Mitchell, to write a 10,000 word "advertorial" for its Earth Day issue. According to Mitchell, who eventually demanded that his name be taken off the article, his piece was first cut to 5000 words, then kicked upstairs to the "marketing gurus," where it was turned into a piece of "pap," made upbeat, with criticism of government and industry largely removed. See Michael Hoyt, *Earthly Editing: The Dirt on The New Yorker's Environmental Advertorial*, COLUM. JOURNALISM REV., July-Aug. 1990, at 8, 9-11. If the marketing department had made the changes only after showing the piece to potential advertisers who objected to certain portions, publication without identification of the piece as an advertisement seems functionally almost identical and almost as objectionable as the publication of "reading notices," which the Act treated as a basis for denying second class mailing privileges.

3. Prohibiting All Advertiser Control Over Non-Advertising Programming

The most obvious area of advertisers' influence on non-advertising broadcast programming involves the specific programming on which its ad appears—the program it “sponsors.” Whether this influence should be permitted is debatable. It is easy to argue that enterprises should not be permitted to use their economic power for the purpose of restricting the speech of others. But advertisers (and sometimes the public) may view programs on which they advertise as in some sense the advertisers' own speech. Advertisers obviously have special economic interests in the content of programming surrounding their ads. Before considering whether or to what extent this type of influence should be permitted, I will survey methods of restricting the influence.

The most direct legal response would be to prohibit this influence—but what behavior would have been prohibited?. A ban on influence could be partially implemented if the law permitted broadcasters to tell advertisers only general things about the programming on which their ads would appear, prohibited pre-screening for broadcasters, and did not permit advertisers to make suggestions directly to the broadcaster or producers about either specific shows or programming in general. Such a law would require great changes in industry practices, but would probably be only marginally effective. Broadcasters risk a loss of good will or, more specifically, the loss of enterprises' willingness to advertise at a given price if programs contain “surprise” elements about which the broadcaster knows the advertiser would object. As long as advertisers pay the bills, considerable influence is unavoidable. Still, the point where advertisers exercise the most influence is in their control over ad placement. Two approaches to reducing advertiser influence attack this placement control.

First, the law could prohibit selling advertising time on particular programs or time slots. Instead of placing ads on particular programs, advertisers would be required to place ads on some other basis. For example, advertisers could purchase access to a given number of viewers of given demographic groups,³⁷⁰ with payment based on a negotiated rate per demographically-specified viewer.

However, informal understandings could defeat this rule. Broadcasting business managers' competition with other stations or

³⁷⁰ See Fahey, *supra* note 217, at 687-88, 691-96.

networks would lead them to be very solicitous of an advertiser's easily discovered preferences. Broadcasters could place ads on the basis of "informal" information concerning advertisers' programming wishes. To combat this, broadcasters could be required to schedule ads using a computer program designed to maximize revenues given different advertisers' different payment rates for viewers of different demographic groups. If this criterion was not determinative, they could be required to randomize placements. Of course, sufficiently timid broadcasters could still design their entire programming to conform to their perceptions of advertisers generic preferences—such as by trying to become "XBC—the upbeat, buying mood network!"

Alternatively, the law could take another tack to severing the connection between advertisers and specific shows. Out of a concern for program integrity,³⁷¹ as well as to prevent over-commercialization and to restrict advertisers' influence, some European countries require all advertising to occur in limited blocks that do not cut into individual programs.³⁷² For example, a broadcaster could be restricted to one block of five (or ten) minutes of advertising each hour, with a rule that the advertising block not break into an individual show unless it lasts over ninety minutes, and then only as an intermission occurring not less than thirty minutes before the end of the show. This requirement would substantially sever the connection between advertising and program content.

The primary objection to these proposals is likely to be financial. Broadcasters would object to the block advertising proposal's limits on the amount of time they could broadcast advertising,³⁷³ and would fear that people would stop watching during these

³⁷¹ For an excellent parody of this, see the film *LADRI DI SAPONETTE* [THE ICICLE THIEF] (Maurizio d'Nichetti 1989).

³⁷² See JOHN C. MERRILL, *GLOBAL JOURNALISM* 96 (2d ed. 1991).

³⁷³ FCC guidelines concerning advertising minutes per hour were abolished during Fowler's implementation of the Reagan administration's deregulation agenda. See, e.g., Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984) (abolishing guidelines of a maximum of 16 commercial minutes per hour on the assumption that the market will result in the proper level of commercialization); cf. *Action for Children's Television v. FCC*, 821 F.2d 741, 749-50 (D.C. Cir. 1987) (remanding FCC decision to abolish commercialization guidelines for children's television). Concern about over-commercialization reappeared in 1990 in respect to children's TV when new legislation limited stations to 10.5 minutes per hour of children's programming on weekends and 12 minutes on weekdays. See 47 U.S.C.A. § 303a(b) (West 1991).

blocks.³⁷⁴ As for the semi-random ad-placement proposal (which only considers demographics), advertisers would have both legitimate and less legitimate objections. The existence of the present system indicates, unsurprisingly, that advertisers (and, therefore, broadcasters) economically value advertisers' program selection. Advertisers' interest in surrounding ads with content calculated to produce buying moods and in avoiding controversial content that may offend some potential customers prostitutes broadcasting to its paymaster. Even if advertisers are willing to pay for this result, it should be disallowed. A policy-based evaluation of the legitimacy of advertisers' demographic interests is more equivocal. These interests tilt media content undemocratically, but as long as advertisements are thought to serve some valuable social function, it may seem appropriate that ads be broadcast to the audience most likely to be interested in them. Anything else would be wasteful.

Advertisers can have reasons to associate ads with particular programming that have nothing to do with censorship. First, sometimes advertisers affirmatively wish to promote high quality programming, a wish that presumably deserves praise, not legal obstacles. Decisionmakers at Texaco may be proud of over fifty years of Metropolitan Opera broadcasts. Xerox's proclaimed policy is to sponsor programs designed "to stretch the mind, to inspire, to stir the conscience and require thought." Xerox says that its "programs should try to advance TV over what it has been."³⁷⁵ Second, advertisers design some commercials specifically for particular programming. This has two dimensions; either the coherence of the ad or the relevance of the advertised product could build on the programming. Commercials for tennis products or commercials for any product containing an endorsement from a

³⁷⁴ Apparently commercial broadcasting can successfully operate with ad time-blocks. The 1987 legislation in Germany that introduced a dual (private/public) broadcasting system in Germany allowed much more advertising on the private than on the public channels but "adhered to the established principle of block advertising for both public and private sectors and stipulated that advertising continue to be kept strictly apart from the rest of the schedule and that it should not influence programme content." PETER J. HUMPHREYS, *MEDIA AND MEDIA POLICY IN WEST GERMANY* 278-79 (1990).

³⁷⁵ BARNOUW, *supra* note 141, at 112. Barnouw notes that such sponsorship policies of a number of major corporations, including Xerox, IBM, Mobil, and Exxon, reflect a number of considerations, including "[a]n image-protection strategy, relat[ed] to antitrust perils" and, in some cases, an attempt to appeal to particularly "sophisticated customers." *Id.* at 111-13.

tennis star make more sense during a broadcast of Wimbledon than of *Murder She Wrote*.

On balance, however, the evils of censorship associated with advertisers' determining which program they sponsor usually outweigh its benefits. All norms of the journalistic and creative communities deny the propriety of advertisers' control over content. Entertainment writers and news personnel in broadcasting consistently reject its legitimacy even as media enterprises require subservience. Journalists and writers should use their professional skills to report news and create entertainment that they think has the greatest worth—material that gives the people what they need.³⁷⁶ Or if this professional paternalism is rejected, professionals should provide the public with what it, rather than the advertiser, wants. Part II illustrated that advertisers' control reduces diversity and restricts even the limited categories of challenging, sobering, or partisan programming capable of attracting audiences. If not *too* costly in terms of decreasing advertising revenue, either the proposal for block-broadcast of ads or for semi-random placement of ads would create a freer, potentially more diverse media.

Countervailing considerations are real, but weak. Denying advertisers the power to mesh ads with particular programs is probably not a major social cost. Despite the fans of Anheuser Busch's "Bud Bowl," which was designed specifically for broadcast on the Super Bowl, its absence is a small price to pay for reducing advertisers' power to censor. More troublesome is the loss of advertisers' opportunity to sponsor "classy," high prestige shows, but this is also probably not too great a cost.³⁷⁷

³⁷⁶ This sounds paternalistic, but often it may be what the public wants and expects. Certainly when someone goes to other professional information providers such as lawyers, doctors, or clergy, the expectation is that they will use their expertise to provide the information that the client needs, not what some third party, such as the pharmacists, want the client to have. In part because he concludes that "most people 'want to want' the news to be enlightening," Christopher Jencks argues that news media should be operated on a non-profit basis. See Christopher Jencks, *Should News Be Sold for Profit?*, in *AMERICAN MEDIA AND MASS CULTURE* 564, 564-67 (Donald Lazere ed., 1987).

³⁷⁷ See *supra* note 375; cf. BARNOUW, *supra* note 141, at 66 (arguing that image problems of major corporations in the early 1970s and earlier partially explains their sponsorship of highly respected public broadcasting programs). But cf. *id.* at 150 (noting that corporate-sponsored high quality programs have fostered an image of culture as "focused on matters removed, in time or place or both, from pressing concerns of the American scene").

If rationales for advertiser controlled placement are sufficiently important, exceptions to the above proposals could give them some scope. The censorship implicit in advertiser control is nullified if this control is restricted to a few shows that became, in part, their "speech."³⁷⁸ Advertisers could be permitted to avoid random placement by paying a 10% "placement" sales tax. In order to keep this revenue within the communications system, it could be allocated to public broadcasting.³⁷⁹ Likewise, an exception to block scheduling of ads could be permitted. Advertisers could pay to be associated with a particular program, with sponsorship noted at the show's beginning and end. If the rules for pricing these sponsorships are properly defined,³⁸⁰ they would provide an incentive to sponsor "prestige" shows, which often increase broadcast diversity and possibly broadcast quality.

In summary, advertiser influence over programming content is usually objectionable but cannot be entirely eliminated. Various reforms could, however, reduce that influence. Each reform has real costs but, tentatively, each proposal offered in this section seems merited.

D. Tax on Advertising in Commercial Video and Broadcasting to Fund Noncommercial TV and Radio

Broadcasters' inability to sell broadcast content directly to viewers leads to market failures that arguably cause under-production³⁸¹ as well as distortions in video production.³⁸² Public

³⁷⁸ Advertisers are probably most inclined and have the most power to engage in objectionable censorship with respect to shows in which they are initially most equivocal about wanting placement.

³⁷⁹ A 10% placement "charge" kept by the broadcaster would not work. A profit maximizing broadcaster who controls pricing could turn this into roughly the existing system where advertisers have to pay more for greater placement control. By denying the broadcaster these tax receipts, the system will be tilted toward random access and will produce a corresponding decline in advertiser censorship power.

³⁸⁰ A broadcaster should be required to sell sponsorships on the basis of a rate per viewer, with the rate set high enough that the market would clear no more than, say, a quarter of its programming. This would encourage advertisers to maximize delivery of consumer surplus per advertising dollar spent, thereby leading to sponsorship of more narrow cast, high quality programming.

³⁸¹ See ROGER G. NOLL ET AL., *ECONOMIC ASPECTS OF TELEVISION REGULATION* 7-19 (1973). Of course, the economists' claim of under-production of broadcast content could be critiqued from a variety of perspectives. See, e.g., JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* (1978); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 3-15 (1985).

³⁸² For example, it is often argued that the dynamics of competition between a

broadcasting can partially correct these market failures. Other justifications for public broadcasting are similar to arguments for governmental financial support for public education and public culture.³⁸³ However, all proposals concerned with public broadcasting eventually must face the question of how it should be supported. Two policy concerns are central: the support should not be too stingy in amount, and it should promote quality without leaving public broadcasting vulnerable to political or ideological censorship by either government or private bodies. No funding approach will be perfect. I will briefly compare four frequently suggested revenue sources for public broadcasting with a fifth advocated here: significant reliance on a dedicated tax on advertising in commercial broadcasting and video distribution. It should be noted, however, that most commentators recognize that any actual system will rely on a combination of several sources—and that this can be a strength if it reduces (nothing can eliminate) the danger of influence, a danger that is the necessary consequence of an entity's power to eliminate any particular source of funding.

Presently, public broadcasting receives its revenue from sources that can be categorized variously but that I will describe as: 1) private—including both viewers and non-commercially controlled foundations; 2) commercial—basically the corporations that advertise on commercial broadcasting; and 3) regular governmental appropriations, made from general revenues. In addition, many countries rely on a special form of government support: 4) dedicated revenue from a sales tax on broadcast receivers or from annual fees paid by viewers for possession/use of such equipment.

Reliance on private contributions greatly understates the value of public broadcasting's programming. "Free rider" problems and solicitation costs prevent viewers' contributions from providing anywhere close to the amount that viewers actually value public television programming. And viewers certainly cannot be expected

limited number of stations or networks will produce an inefficient amount of diversity. See NOLL ET AL., *supra* note 381, at 58-96. The problems of underproduction and distortion are being partially but not completely cured with the increased prevalence of cable, which has many channels and can sell directly to consumers. But this is only one of a number of predictable market failures in the delivery of broadcast programming, issues that are generally beyond the scope of this paper.

³⁸³ See generally CARNEGIE COMM'N ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 9 (1967) [hereinafter A PROGRAM FOR ACTION]; CARNEGIE COMM'N ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST 101-10 (1979) [hereinafter A PUBLIC TRUST]. I will not try to canvass these arguments for public broadcasting here.

to pay for the public good externalities of public broadcasting. Foundation support may fill a portion of the gap, but again cannot be expected to be adequate. Corporate contributions exhibit both problems listed above: they are insufficient in amount, and create the danger of censorship. The evils associated with advertising discussed in Part II, problems that partially explain the need for public broadcasting, would be introduced by extensive reliance on corporate contributions. Thus, all serious studies of public broadcasting conclude that significant government support is essential.³⁸⁴

Government funding can take various forms—for example, the third or fourth options listed above. Presently, it comes from appropriations from general tax revenues. These funds partially compensate for market failures in the provision of broadcasting and admirably move toward a more efficient level of expenditures. Nevertheless, reliance on general tax revenues has two distinct disadvantages. First, it may be difficult to sell politically the notion that we have so little TV that we need to devote scarce public tax revenues to the field. Second, and more importantly, it is difficult to entrench annual expenditures from general tax revenue in a manner that avoids constant political scrutiny. The result is acute vulnerability to political retaliation for critical programming, which spawns timidity and a status quo orientation.³⁸⁵

The press's vulnerability to governmental retaliation has led many countries to constitutionalize their guarantee of a free press. But given the inevitable tension between institutional independence and the need for government support, the response to this danger must involve efforts to design structural features that reduce the danger. A variety of structural features of the existing public broadcasting system have been designed to reduce, and other devices could further reduce,³⁸⁶ both the opportunity and the incentive for government censorship or partisan manipulation. In particular, public broadcasting needs government support structured to reduce the twin dangers of inadequate financing and improper censorship.

³⁸⁴ See A PROGRAM FOR ACTION, *supra* note 383; PUBLIC BROADCASTING: A NATIONAL ASSET TO BE PRESERVED, PROMOTED AND PROTECTED (John Wicklein ed., 1988) [hereinafter PUBLIC BROADCASTING]; A PUBLIC TRUST, *supra* note 383.

³⁸⁵ See John Wicklein, *Time for a Public Broadcasting Overhaul*, N.Y. TIMES, Feb. 26, 1989, at H35.

³⁸⁶ See, e.g., PUBLIC BROADCASTING, *supra* note 384.

As a possible solution, consider a dedicated revenue source that provides public broadcasting with all the revenue from (1) an annual fee for receivers or a sales tax applied to television and radio receivers³⁸⁷ or (2) a tax on advertising in commercial broadcasting (or on advertising in all commercial video products, including broadcasting, cable, movies, and video cassettes). Both proposals respond to the two dangers noted above. Since they rely on money that either consumers or advertisers willingly spend within video-oriented markets, these dedicated taxes avoid the appearance of "wasting" scarce general tax revenues on more television. More importantly, after setting a sensible tax rate that would provide an appropriate revenue stream, either system could operate without any immediate impetus for annual legislative reconsideration. A dedicated tax should provide a more stable and less politically vulnerable revenue stream than do annual appropriations from general revenues.

A tax on advertising has several advantages over annual fees for or taxes on receivers. First, the advertising tax is likely to be less regressive. In a society where virtually all households have a television, an annual receiver license fee amounts to a charge leveled on everyone independent of income.³⁸⁸ Such a regressive poll tax is apparently popular only with Margaret Thatcher. In contrast, an advertising tax burdens only those who benefit from the advertising itself, and in proportion to the amount they benefit. It benefits those people who—or "when"—they watch public broadcasting,³⁸⁹ e. a and does not have the systematic regressivity of a tax

³⁸⁷ In a slight variation, the Working Group for Public Broadcasting suggests a 2% tax on consumer electronics products; it estimated this would provide \$600 million in 1989, which was apparently "more than twice that now raised for public-broadcast programs from all sources." Wicklein, *supra* note 385, at H41. In 1986, public broadcasting had a total income from all sources of \$1.4 billion, of which about \$250 million went into programming. See PUBLIC BROADCASTING, *supra* note 384, at 9.

³⁸⁸ A sales tax on receivers (or consumer electronics) might be preferable to the annual fee. It could be slightly progressive to the extent that wealthy households spend more on televisions (per person) due to having more televisions, more expensive televisions, or replacing televisions more often.

³⁸⁹ The main arguments for public television relate to adding diversity and a voice independent of advertisers, that is, for its contributions to a democratic society. Still, public television most immediately benefits those that watch (and who produce) it. One interesting study found two groups watched public broadcasting more than the society wide norm: blacks and the relatively wealthy, an interesting grouping. See RONALD E. FRANK & MARSHALL G. GREENBERG, *THE PUBLIC'S USE OF TELEVISION: WHO WATCHES AND WHY* 175 (1980) (collecting data in 1977-78 showing that 26% of the general population, but 31% of blacks and 31% of higher income groups watched public television at least once a week).

on receivers. Second, an advertising tax could provide significant revenue needed for public broadcasting.³⁹⁰ Third, like the TA-SR proposal for the print medium, this tax reduces advertiser control over broadcasting in favor of control by a more independent, professional body whose mission is to serve the public.³⁹¹ Unlike the TA-SR proposal's effect of tilting power toward readers and away from advertisers within the medium as a whole, this proposal creates an independent parallel medium—leaving advertising to rule in commercial broadcasting.

In addition to reflexive opposition from the advertising and commercial broadcasting industry, two arguments of theory or "principle" could be leveled against the dedicated advertising tax. First, the video and broadcast advertising tax will presumably cause some erosion of advertising expenditures in broadcasting.³⁹² If broadcasting is inadequately supported at present, this tax would worsen the situation. Despite its economic logic, however, the claim that we spend too little on commercial broadcasting is dubious.³⁹³

³⁹⁰ In its 1979 report, the Carnegie Commission concluded that public broadcasting needed \$1.2 billion in 1979 dollars (\$590 million to come from the federal government) while in 1977 it received \$482 million from all sources. The Commission proposed a tax on spectrum space (instead of the first Carnegie Commission's recommendation of a tax on the purchase of TV sets, which it calculated would provide at most \$100 to \$200 million). It reported broadcasters' advertising revenue to be, at that time, about \$8 billion. See *A PUBLIC TRUST*, *supra* note 383, at 93, 98, 103-04, 118, 139-40, 143-45. Thus, in 1979, a 7% advertising tax would have then produced about \$560 million. The Commission recognized various merits of a dedicated advertising tax, but rejected the proposal apparently because the Commission expected that commercial broadcasters would use payment of this tax to justify reducing their public-service obligations. *Id.* at 141. Nevertheless, it is not clear that this argument would succeed if public-service obligations are otherwise merited. On the other hand, the Reagan administration's deregulatory revolution largely eliminated these public-service obligations. Finally, imposition of spectrum fee is likely to generate pressures both to further reduce public-service obligations and to increase stations' profit orientation.

³⁹¹ Politically, the tax on consumer electronics might be "easier" (although still not easy) to adopt. The tax on advertising will receive intense opposition from two groups—the advertising industry and the commercial broadcasters—that are politically better organized and more strategically located than the public, or for that matter, any other industry.

³⁹² It would be advantageous if this tax were adopted in tandem with the tax on advertising in the print media, or even better, a general tax on advertising and promotion. The broader tax would reduce the incentive to advertisers to leave one medium, thereby reducing its support, for another.

³⁹³ In a fuller investigation of the economics of commercial broadcasting, I hope to show that the nature of monopolistic competition in broadcasting causes wasteful, misdirected expenditures on production and that the industry has significant negative externalities. These observations lead to the view that commercial television's

But putting these assertions aside and accepting the claim that too little is spent on broadcasting, the costs from a decline in total revenue spent on broadcasting and the benefits from (an assertedly) better allocation of the revenues within broadcasting due to the dedicated tax should be compared. It seems likely that the benefits will be more significant and the costs slight, but this conclusion will inevitably be contested.

Second, the proposal imposes a special tax on a form of communication. Some might claim that doing so always makes the tax objectionable, and perhaps unconstitutional. Special taxes are sufficiently manipulable that they should always be troublesome. Although the advertising tax is not overtly viewpoint biased, the only reason for the dedicated tax is a judgment that it would result in a better mix of broadcast content, with comparatively less spent on commercial television and comparatively more on public television. It can also be argued that the government has no business making such judgments and that these determinations should be left to the market—equating freedom of the press with “free” markets. Such a broad argument is, however, economically misguided and historically myopic. Above, I described the failure of “free” markets to supply either the content that people want or that democracy requires, and argued that reducing the sway of advertising can make the press “freer.” Historically, we have never relied on an unadorned free market: state intervention to structure the market or promote better press outputs has been a constant. Virtually no one uniformly objects to all these interventions—but only to interventions the critic specifically dislikes. When tested on the merits, both the dedicated tax and the public broadcasting support are desirable interventions and, I will argue in Part V, constitutional.

E. A New State Communications Environment

As a matter of politics, some of the policy proposals might be best contested at the state level. Certainly, a state could itself effectively implement most of the proposals, and possibly could do so in a simpler and more rational manner.

For example, a state could eliminate the exemption from the state sales tax generally given to advertising. It could dedicate the

greatest need is for a different decision-making structure and a different competitive environment that could lead to a redirection of the expenditures that it does make.

proceeds to improving the state's communications environment. The tax revenues collected from newspaper advertising could subsidize newspapers' circulation revenue. The tax revenue collected from advertising in broadcasting could fund public television and public radio outlets within the state. A fixed portion of the tax revenue from other advertising expenditures could provide for public access cable channels. Any remaining revenue could go to a bipartisan commission, somewhat like existing state endowments for the arts and the humanities, to fund both on-going and experimental non-profit communication forms, including theaters and concerts.

As a practical matter, progressive state legislatures are probably a more receptive audience for many of these proposals. The extensive political organization needed to push for reform may be more possible in individual states. If, over time, local experiments appeared beneficial, other states or the federal government could adopt similar measures. Of course, reliance on state innovations also presents problems. Small states could be subject to political blackmail—boycotts by the advertising industry.

No easy passage can be expected no matter how meritorious the proposals. In Sweden, a tax and subsidy scheme was first seriously proposed by the first Parliamentary Commission of the Press of 1963, but was soundly rejected, with the newspaper industry forcefully arguing that the proposal would violate constitutional guarantees of press freedom.³⁹⁴ Only after almost ten years of debate and reflection was this initial rejection reversed, with selective subsidies receiving widespread support. A new consensus developed behind a press policy that views state intervention and support as necessary to maintain a free press that properly performs its functions in a democracy.³⁹⁵ Reform is unlikely to come any easier or quicker here.

³⁹⁴ See GUSTAFSSON & HADENIUS, *supra* note 308, at 78-79.

³⁹⁵ See *id.* at 52, 57-59, 77-78; see also Gustafsson, *supra* note 313, at 104, 112. More recently, newspaper publishers object primarily to the advertising tax rather than any violation of freedom of press implicit in selective subsidies. See *id.* at 117.

V. THE CONSTITUTIONALITY OF TAXATION OR REGULATION OF ADVERTISING

It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.³⁹⁶

Justice Hugo Black

The Press Clause is best understood as a structural provision designed to protect an institution (or a category of enterprises) because of its contribution to various forms of human good, in particular, the press's contribution to checking governmental abuses and its provision of perspective and information useful to people in their self-defining activities.³⁹⁷ This instrumental, structural

³⁹⁶ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

³⁹⁷ Many commentators read the Press Clause this way. *See, e.g.*, BAKER, *supra* note 11, at 229-49; Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) (asserting that the primary purpose of the First Amendment's Press Clause was to create a "fourth estate" outside government as a check on the power of the executive, legislative and judicial branches); *cf.* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (asserting, on the basis of an historical analysis of the Press Clause, that it was originally viewed primarily as a restraint on governmental abuses); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (arguing that the "checking function" of free expression on abuses of official power should play a major role in First Amendment adjudication).

The main alternative rejects any special concern with the press as an institution and reads the Press Clause as serving the same purposes as the Speech Clause; then, the Press Clause merely makes clear that written forms (and maybe other media and various artistic forms) merit the same protection as does speech. *See, e.g.*, David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975) (arguing that freedom of the press is a personal, and not an institutional, right); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) (arguing that history, precedent, and constitutional principles do not support a special status for the press, and that a preferred constitutional position would actually work against the organized press's interests); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977) (suggesting that a "preferred" position for the press would lead to licensing and both the press and the public are better served if the Press Clause is not viewed independently from the Speech Clause).

understanding, however, does not itself determine whether the Press Clause should receive one or another doctrinal reading.³⁹⁸

A. *A Broad or Narrow Reading of the Press Clause*

The Press Clause can be read broadly or narrowly on various axes. Elsewhere I have argued for a particular "broad" reading of the Press Clause in the sense that the Constitution mandates that the press receive special "defensive" protection against governmental intrusion into its operations, such as protection against compelled disclosure of confidential sources or against third party search warrants.³⁹⁹ On the axis of concern in this Article—governmental taxation or structural regulation—a broad "neutrality" reading would prohibit any special treatment of the press, any special taxes and regulations, and any differential treatment.⁴⁰⁰ A narrower reading, which I will call the "bad-purpose" reading, would only prohibit special treatment that has some specific, objectionable aspect—for example, an impermissible purpose. The choice between these two readings is likely to turn on an evaluation of the primary threats to, and the significant needs of, a democratic free press.

Either public or private power can threaten press freedom.⁴⁰¹

³⁹⁸ Arguably, the Supreme Court currently accepts the press-is-not-special reading of the Press Clause rather than Justice Stewart's institutional, fourth estate interpretation. Although this prism does not cast as informative a light on the issues discussed here as does Stewart's instrumental/institutional interpretation, it is possible (and maybe easier) to reach the conclusions advanced in this section from the press-is-not-special perspective. See, e.g., *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (upholding constitutionality of state tax on cable television subscriptions, even though tax exempted the print media). No matter which interpretation is employed, the constitutional conclusions reached here receive case law support.

³⁹⁹ See *BAKER*, *supra* note 11, at 245-49 (arguing against results in cases such as *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)).

⁴⁰⁰ See Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977) (arguing that complete independence from governmental support or regulation is essential to preserve freedom of the press). At the very least, the Press Clause would prohibit such rules unless the special rules had compelling rationales and unless the rules were narrowly drawn to fit the rationales precisely.

⁴⁰¹ Of course, a definitional argument that only government can limit press freedom—that what a private power does is "by definition" an exercise of freedom—is possible. As long as the press is understood as an institution serving various human purposes, this definitional argument is wrong as well as uninteresting. Conceptually, identification of the institution "the press" will necessarily involve governmental or collective norms. Practically, if one person owned all the presses in the country and ordered that the press print nothing or only print a narrow range of views, few would

A single-minded fear of government abuse requires that all special treatment of the press be condemned. Even special privileges or "subsidies" are threatening because they allow government to manipulate the press by threatening to take away the privileges or promising new benefits.⁴⁰² The carrot combined with the possibility of its withdrawal could create a dependent, docile institution. Allowing legislative bodies both to bestow favors and to impose burdens creates a real danger that the press will pull punches to curry favor.

A broader view of potential obstacles to a free press sees private power and market processes as significant threats to the press's capacity to serve the needs of a democratic society. This broad understanding leads to the narrower, bad-purpose interpretation of the Press Clause. Its central premise is to recognize that government intervention can either promote or undermine press freedom. A properly acting democratic government would intervene only to promote freedom, but history shows that governments sometimes intervene improperly. By providing for judicial review under the Press Clause, the Constitution allows a second institution, the judiciary, to evaluate the propriety of governmental interventions, and strike down those that it concludes serve an improper purpose. This hopefully maximizes our prospects. The legislature will sometimes, not always, be wise enough to intervene to increase freedom. The courts likewise will sometimes, not always, be wise enough to catch the occasional improper legislative interventions. Unlike the neutrality interpretation, the bad-purpose reading allows normal democratic processes to promote freedom but retains judicial review to check governmental abuse.⁴⁰³

argue that the country had a free press in any meaningful sense. Press freedom requires that this arrangement be broken up: requiring, for instance, that the antitrust laws be applied to the press whether or not they apply elsewhere.

⁴⁰² Hertzgaard suggests that the Reagan administration manipulated the press by granting (or promising) benefits while the Nixon administration relied on burdens or threats of burdens. It is pretty clear that the former approach secured the more favorable treatment. See HERTSGAARD, *supra* note 95, at 182.

⁴⁰³ A constitutional regime that did not maintain our "state action" or public/private distinction might offer the press *constitutional* protection from both governmental and private threats. Quite obviously such a constitutional standard, if combined with judicial enforcement, would require development of a more precise theory of what constitutes both the press and its freedom in order to identify threats, particularly private threats, to that freedom. Although the danger of private threats is real, the identification of what counts as a private restriction on freedom and, within limits, what counts as the "press," arguably should be left to legislative bodies.

Not only a broad understanding of threats to freedom, but a broad understanding of the needs of the press, leads to the bad-purpose interpretation. Any institution needs many resources to function effectively. The market and general provisions of law might routinely provide these resources. However, the press may need and a democratic society may be better served if the press receives a variety of special privileges or opportunities. Only the bad-purpose interpretation of the Press Clause permits these grants.⁴⁰⁴ The neutrality interpretation must assume either that special provisions are not needed, not useful, or are more dangerous than they are worth.

The neutrality reading would be supported if a press, unregulated except by generally applicable rules and taxes,⁴⁰⁵ creates a proper, "undistorted" or "unbiased" marketplace of ideas while any government intervention causes distortions or biases.⁴⁰⁶ Unlike the other arguments for the "neutrality" interpretation, this rationale is unsupportable. In practice, the government participates massively in the information marketplace and virtually no one thinks that all aspects of this participation are bad.⁴⁰⁷ At least since Jerome Barron forcefully argued for a First Amendment right of access to the press largely on the ground that the existing marketplace of ideas is overwhelmingly biased toward large corporate centers of power,⁴⁰⁸ few in legal academia have imagined that the

Under this pragmatic view, legislative remedies for private threats should not be required, but also should not be outlawed by the First Amendment's Press Clause. See BAKER, *supra* note 11, at 250-71.

⁴⁰⁴ Although this result requires rejection of the neutrality interpretation, the bad-purpose interpretation is equally consistent with the legislature providing for these needs or with the conclusion that the press does not need any special benefits.

⁴⁰⁵ The Supreme Court has consistently held that generally applicable laws can be applied to the press. I am aware of no modern constitutional scholar who objects to that conclusion. Since these rules can greatly change the content of the press, their acceptability makes a mockery of the notion of natural, undistorted media content.

⁴⁰⁶ Periodically, this argument appears in judicial opinions. In objecting to a tax on cable services but not on newspapers, Justice Marshall used language suggesting the undistorted marketplace notion. Although he generally relied on doctrinal arguments and policies more like the first reasons mentioned in the text to support a "neutrality" interpretation, he also found "a special obligation on government to avoid disrupting the integrity of the information market." Further, he found a constitutional flaw in differential taxes because "they distort the competitive forces that animate this institution." *Leathers v. Medlock*, 111 S. Ct. 1438, 1453 (1991) (Marshall, J., dissenting).

⁴⁰⁷ See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

⁴⁰⁸ See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV.

actual media marketplace is neutral or unbiased. Theoretically, the notion of an unbiased or neutral information context lacks clear meaning. There are no uncontested criteria of neutrality.⁴⁰⁹ The appropriate content (or structure) of the information marketplace necessarily depends on political choice. Rather than the doctrinaire assertion that the unregulated market is neutral, the more meaningful concern is that an *unregulated* market produces characteristic, objectionable tilts.

This Article's claim that private power, and particularly advertisers' power, poses a major threat to press freedom requires rejection of the neutrality interpretation of the Press Clause since it would thwart effective responses to these threats. The alternative, the bad purpose interpretation, still leaves plenty for the Press Clause to do. The bad-purpose reading is premised on the view that both private and public restrictions of press freedom can be serious problems. This insight suggests a number of doctrinal elements. First, government regulations having bad purposes would be outlawed and efforts to censor or to burden media because of its content invalidated. Second, the bad-purpose reading would rule out gratuitous burdens on the press. Such burdens could be understood as implicitly having a bad purpose. The objection could also be that the gratuitous burdens are inconsistent with the Constitution's implicit attribution of an especially high value to the press. For example, even without evidence of a bad purpose, it would be impermissible to impose a *special* tax on the press justified *merely* on the grounds that it provides revenue. Given its constitutionally recognized value, the press should not be treated as a special fountain of governmental tax revenue. Third, purposes to make the press operate more effectively, and to protect it against private threats to its freedom, should rank as specially important.

This just begins a sketch of the bad-purpose interpretation. Doctrinal criteria for identifying unconstitutional government threats to the press could take a number of forms. For example, when do benign purposes adequately justify special rules directed at the press? Maybe any special rule not shown to have a bad purpose should be allowed. Alternatively, since general rules will

L. REV. 1641 (1967); see also *supra* text accompanying notes 257-76 (arguing that an unregulated marketplace produces market failures and that a "proper" marketplace requires reformulation on basis of distributive and self-definitional concerns).

⁴⁰⁹ See BAKER, *supra* note 11, at 37-40 (arguing that there are no criteria for identifying an unbiased marketplace of ideas).

usually suffice as responses to most social issues, and since bad purposes are often difficult to identify, maybe constitutional doctrine should permit special rules only when they are reasonably seen as promoting a free, democratic press.

Consider bans or at least heavy presumptions against certain types of interventions. The bad-purpose reading might adopt these approaches if experience or reason suggests that particular types of interventions are especially dangerous or involve contexts where bad purposes are especially hard to identify. Thus, special taxes directed at the press may seldom be needed to serve a legitimate purpose but may be sufficiently dangerous that they should be presumptively banned for prophylactic reasons.

As description, the neutrality interpretation is a loser. The United States has always intervened in the media marketplace, both as a participant and in a manner directed at influencing the content and availability of the constitutionally protected press.⁴¹⁰ Many benefits are given specially to the press—often to individual media enterprises. Huge subsidies like second class mail privileges (given to newspapers and periodicals not primarily designed for advertising), special press facilities (for those with press cards), tremendous revenue from government advertising (often expended on favored media enterprises), selectively granted interviews with valuable governmental “sources,” press releases given specially to the media, and access to governmentally controlled space where admission depends on having a governmentally issued press card are routine. Other interventions such as the civil war tax on advertising, the ban on broadcasting tobacco ads, or any other restriction on advertising freedom with the consequent reduction on advertising revenue drain resources available to the press. Some special benefits, such as government advertising or grants of interviews, are routinely used to manipulate press content, often for partisan reasons. None of these special privileges or burdens, however, has been found to be per se impermissible. Rather, courts more carefully intervene only

⁴¹⁰ In the free press context, advocates of a free market generally make their claim in terms of objecting to any regulations or taxes aimed specially at the press. When I assert that we have always had governmental intervention, I am referring to intervention specially oriented toward the press. The broader notion of an “unregulated” market is, of course, a myth. The existence of a market depends on regulation, at least in the form of choosing one or another set of rights to protect transactions and to give specifiable consequences. See Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

if they find that granting or withholding of these benefits is for an impermissible reason.⁴¹¹

Many forms of state intervention simply are not seen, here or anywhere else in the world, as inconsistent with press freedom. A study of the press of sixteen western democracies found all countries, including the United States, had at least a moderate level of state intervention.⁴¹² Sweden, for example, has the highest level of state intervention in the press, yet virtually no one charges that censorship occurs there.⁴¹³ Sweden was also the first country to establish freedom of the press, a value it takes very seriously.⁴¹⁴

Largely as a result of governmental intervention, Sweden has a much higher rate of newspaper competition than does the United States. Swedes are also twice as likely as people here to purchase a newspaper, and often purchase two competing newspapers.⁴¹⁵

The neutrality interpretation might adjust to these practical realities and only condemn those special governmental interventions that impose burdens. Arguably, the stick presents the greatest danger.⁴¹⁶ Nevertheless, this doctrinal adjustment cuts the heart out of the neutrality reading. By accepting some interventions as properly serving the free press, thereby allowing special treatment even though it poses the specter of dependence and manipulation, the neutrality view would lose its coherence. It now becomes merely a version of the bad-purpose view, which tries to identify the circumstances of intervention or the types of intervention that threaten press freedom. However, the case law rejects even this revised version of the neutrality reading. When the purpose is

⁴¹¹ For example, the government cannot deny press passes to media personnel because it does not like the content of their reporting. *See Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (stating that in addition to the impermissibility of content-based reasons to deny White House press passes, the refusal to grant passes "to bona fide Washington journalists . . . must be based on a compelling governmental interest"); *Borrec v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974) (stating that a mayor cannot deny a particular reporter access to press conferences on the ground that the reporter was irresponsible, inaccurate, biased, and malicious).

⁴¹² *See Picard*, *supra* note 341, at 33.

⁴¹³ *See, e.g.*, 2 *WORLD PRESS ENCYCLOPEDIA*, *supra* note 18, at 834 ("There is no censorship in Sweden in any form of media, with the sole exception of the motion picture industry.").

⁴¹⁴ *See id.* at 832.

⁴¹⁵ *See supra* text accompanying note 60.

⁴¹⁶ It is usually easier for a press enterprise to reject inducements or "bribes" than an effectively enforced prohibition—thus, prohibitions on press behavior present the greatest interference with press freedom. Still, a prohibition on publication can easily become an overt target of massive popular resistance while the more insidious effects of bribes are often ignored, generating little public indignation.

acceptable, the courts have upheld even regulations that disadvantage the press or, worse, that selectively disadvantage some elements of the press.

In *FCC v. National Citizens Committee for Broadcasting*,⁴¹⁷ newspapers challenged ownership restrictions barring them from receiving a license for a broadcasting station in the area where they operate their newspaper. These ownership restrictions applied only to newspapers. The Court, emphasizing that not everyone will be able to obtain a broadcast license,⁴¹⁸ upheld the restrictions. It explained that "the regulations are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it."⁴¹⁹ This good purpose, and lack of a bad purpose, apparently justified differential, negative treatment of newspapers. The Court held that "[t]he regulations are a *reasonable* means of promoting the public interest in diversified mass communications; *thus* they do not violate the First Amendment."⁴²⁰

The FCC also crafted rules that required divestiture in sixteen "egregious" cases but allowed other combinations to continue, thereby targeting a small group of media enterprises for specially negative treatment. Despite this discrimination among newspapers, the Court upheld the rules as a "rational" way to promote the public interest in this communications arena. Although the case might be limited because it involved the constitutionally unique realm of broadcasting, the Court apparently was willing to sanction differential, burdensome treatment of newspapers as compared to other license applicants. It even sanctioned differential treatment among newspapers as long as no bad purpose was shown and a good purpose related to improving the communications sphere was served.

Similar reasoning lead the Ninth Circuit to uphold the Newspaper Preservation Act. The Act exempts failing newspapers from otherwise applicable antitrust restrictions on forming a "joint operating agreement" (JOA).⁴²¹ Challengers argued "that certain

⁴¹⁷ 436 U.S. 775 (1978).

⁴¹⁸ See *id.* at 799.

⁴¹⁹ *Id.* at 801.

⁴²⁰ *Id.* at 802 (emphasis added). The court found that the regulation's reasonableness was "underscored" by the possibility of waivers. *Id.* at 802 n.20. Thus, in this situation, the possibility of differential treatment among newspapers, although only for the good purpose of promoting the public interest in the communications marketplace, apparently added to the regulation's acceptability.

⁴²¹ See *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 470 (9th

newspapers are treated differently, i.e., preferentially"⁴²² in that some newspapers get the advantage of JOA's to create a media juggernaut that threatens its actual or potential competitors. Those in Congress opposing the Act had made the same point: "[The Act] will preserve certain newspapers but will stifle competition in ideas by crippling the growth of small newspapers and preventing successful establishment of competing dailies."⁴²³ The Act treats newspapers differently than other businesses by partially exempting them from the antitrust laws; it also clearly favors some papers and disadvantages other existing and potential competitive papers in the area by allowing two papers to form a JOA, thereby gaining market power. Still, with quite superficial reasoning,⁴²⁴ the court upheld the Act. It implicitly accepted differential treatment of newspapers, even though this treatment disadvantages some media enterprises, as long as the law has an acceptable purpose—in this case, the policy of preserving editorial diversity.

Even if the Court *generally* upholds governmental action specifically directed at the press as long as the purpose is acceptable, in certain contexts, specifically taxation, the dangers of abuse may be sufficient and the need for special treatment may seem sufficiently remote that the Court would apply a prophylactic rule that bars all differential treatment.⁴²⁵ The rule would be that "freedom of the press prohibits government from using the tax power to discriminate against individual members of the media or

Cir. 1983), *cert. denied*, 464 U.S. 892 (1983).

⁴²² *Id.* at 483.

⁴²³ *Id.* at 481 (quoting H.R. REP. NO. 1193, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3547, 3558).

⁴²⁴ For example, the court responded to the charge of differential treatment by observing that "other newspapers in the Seattle area . . . may participate in a joint operating agreement if they qualify." *Committee for an Independent P-I*, 704 F.2d at 483. Of course! All differential legislation would give its advantages to the complaining parties if they were different than they are and, thus, meet the qualifying criteria. This empty observation is not enough to remove the charge of discrimination. The court also gave virtually no response to probably the most questionable aspect of the Newspaper Preservation Act: its grant of discretion to the Attorney General to decide whether to approve an application to form a JOA. This discretionary governmental power could easily influence the editorial orientation of a paper hoping to enter into a JOA. See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 219 (1991).

⁴²⁵ See POWE, *supra* note 424, at 226.

against the media as a whole."⁴²⁶ Until very recently, this reading of the case law was quite plausible.

In *Grosjean v. American Press Co.*,⁴²⁷ the Court struck down a 2% gross receipts tax on newspapers with a weekly circulation above 20,000. According to Senator Huey Long, the law was a "tax on lying."⁴²⁸ The circulation criterion exempted all but 13 of about 124 publishers in the state, but the 13 large circulation papers included all 12 papers that had "ganged up" on the Senator.⁴²⁹ In *Minneapolis Star v. Minnesota Commissioner of Revenue*,⁴³⁰ the Court struck down a "use tax" imposed on the cost of paper and ink products consumed in the production of newspapers. The tax exempted the first \$100,000 of ink and paper, thus effectively exempting all but 14 of the 388 paid circulation papers in the state, leaving the largest paper to pay about two-thirds of the money raised by the tax.⁴³¹ The Court objected both to imposing a special tax on newspapers and to discriminating among the papers.⁴³² In *Arkansas Writers' Project v. Ragland*,⁴³³ the Court invalidated the application of a general sales tax that exempted all but a few magazines, which were identified on the basis of content. These cases, particularly the two most recent, contain language suggesting that any tax imposed uniquely on the press or that discriminates among elements of the press would be struck—or certainly would require a compelling justification to be sustained.

Then, in its 1991 decision in *Leathers v. Medlock*,⁴³⁴ the Court upheld a tax on cable providers that did not apply to newspapers or other media. Given its acceptance of the state court's conclusion that cable and satellite pay-television are effectively the same medium, the Court even upheld differential tax treatment within a

⁴²⁶ *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991) (Marshall, J., dissenting). Note that this still is not quite equivalent to the neutrality interpretation, which would also prohibit discriminating in favor of the media as a whole.

⁴²⁷ 297 U.S. 233 (1936).

⁴²⁸ See *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (describing the historical background of the *Grosjean* case).

⁴²⁹ See *id.*

⁴³⁰ 460 U.S. 575 (1983).

⁴³¹ See *id.* at 578. From another perspective the exemption and tax were even handed—all papers received the same exemption, although the result was that most papers thereby avoided all liability under this tax while the larger papers had their liability reduced by \$4000. See *id.*

⁴³² See *id.* at 591.

⁴³³ 481 U.S. 221 (1987).

⁴³⁴ 111 S. Ct. 1438 (1991).

single medium by allowing the exemption of satellite services.⁴³⁵ It arguably jettisoned its earlier principles; the Court's statement, "[t]hat [a part of the press] is taxed differently from other media does not by itself . . . raise First Amendment concerns. . . . [A] tax that discriminates among speakers is constitutionally suspect only in certain circumstances,"⁴³⁶ is hard to reconcile with its statement four years earlier that "[o]ur cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment [S]elective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State."⁴³⁷

Nevertheless, despite some broad dicta,⁴³⁸ the earlier cases never should have been interpreted to support a broad non-discrimination principle. Rather, these cases are more consistent with the bad-purpose reading of the Press Clause—namely, that good purposes can justify special treatment of the press, especially if the purpose is to improve the functioning of the press. The only reason constitutional restraints may seem more stringent in the tax than in the regulatory context is that historically differential tax treatment could seldom be explained as serving a good purpose.

Louisiana's two percent "tax on lying" certainly had an illicit purpose.⁴³⁹ The Minnesota tax presents a more difficult issue. The most obvious purpose of any tax is to raise revenue, but the Court persuasively argued:

Standing alone, . . . [this interest in raising revenue] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.⁴⁴⁰

⁴³⁵ See *id.* at 1445, 1447.

⁴³⁶ *Id.* at 1442.

⁴³⁷ *Arkansas Writers' Project*, 481 U.S. at 227-28 (footnote and citations omitted).

⁴³⁸ See, e.g., *id.* at 228 (stating that objectionable "types of discrimination can be established even where . . . there is no evidence of an improper censorial motive").

⁴³⁹ See *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983).

⁴⁴⁰ *Id.* at 586 (footnote omitted); see also *id.* at 589 n.12 (noting again that the state is not prohibited from taxing the press as it does other businesses); *id.* at 590 n.14 (observing that since even profitable newspapers sometimes sell for less than the cost of paper and ink, and instead obtain necessary revenue from advertising, the use tax on inputs may be more burdensome than the sales tax).

If any aspect of *Minneapolis Star* and *Arkansas Writers' Project* failed to survive *Leathers v. Medlock*, it may be the view that the revenue raising purpose will never

This argument basically explains *Minneapolis Star*.

Despite its broad dicta, *Arkansas Writers' Project* also supports the bad-purpose reading. The magazines targeted by the sales tax—three magazines at most paid the tax⁴⁴¹—were identified by content, making the differential treatment presumptively objectionable.⁴⁴² Beyond the discrimination and its content basis, the State's key failing was that it could not offer a plausible, acceptable purpose to explain the differential treatment.⁴⁴³ The Court repeated the objection to the revenue raising purpose that it had made in *Minneapolis Star*,⁴⁴⁴ and then considered the state's suggestion that the legitimate purpose was "to encourage 'fledgling' publishers." Finding the tax exemption both "overinclusive and underinclusive" in relation to this purpose, the Court implicitly rejected the justification as an implausible understanding of the exemption's purpose.⁴⁴⁵ Still, the most interesting aspect of the Court's analysis is that "encouraging fledgling publications" is precisely the type of purpose of improving, expanding, diversifying the media marketplace that the Court has approved in regulatory cases. Without deciding the issue, the Court admitted that this purpose might justify the tax if it had been "narrowly tailored to achieve that end."⁴⁴⁶ In other words, even before *Medlock*, the Court may have been less committed to a nondiscrimination principle than to a requirement of a proper purpose justifying

justify a tax that singles out the press or some portion of the press for special treatment. A narrower rule consistent with the cases would be that, although purely revenue-raising purposes will not justify *special tax burdens* on the press, *exemptions* of some elements of the press from a general tax may be permissible unless chosen on the basis of content.

⁴⁴¹ *Arkansas Writers' Project*, 481 U.S. at 229 n.4 (stating that whether *Arkansas Times* was the only magazine that paid the tax or whether two others also paid did not have to be decided, because in either case it was clear that the burden fell on a limited number of publishers).

⁴⁴² See *id.* at 229-30.

⁴⁴³ See *id.* at 234; see also *id.* at 234-35 (Stevens, J., concurring in part and concurring in the judgement).

⁴⁴⁴ See *id.* at 231-32. For an analysis of the current state of this revenue raising argument, see *supra* note 440.

⁴⁴⁵ See C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1094 (1980) (arguing that the Court's examination of the fit of the law and a proposed purpose is usually a means for determining what purpose should be attributed to a law); C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 972-84 (1983) (arguing that "contextual purpose" or "meaning," not the lawmaker's subjective intent, usually is and should be the constitutional concern).

⁴⁴⁶ *Arkansas Writers' Project*, 481 U.S. at 232.

differential taxation. The cases merely illustrate that in the tax context the state routinely fails to provide such a justification.

B. *Protected Commercial Speech?*

The discussion has so far examined newspapers' possible claims that a tax or regulation violates its press freedom. Regulation or taxation of advertising, the issue raised by Part IV's policy proposals, implicates advertisers' possible constitutional rights even more directly.⁴⁴⁷ For several years after the Court's mid-1970s decisions finding commercial speech protected by the First Amendment,⁴⁴⁸ advertisers' constitutional claims had considerable force.

More recent decisions, however, make shambles out of the notion that commercial speech receives significant constitutional protection. The Court has adopted a four part test that permits even "paternalistic" regulations aimed at preventing the commercial speaker from providing non-misleading information, if the regula-

⁴⁴⁷ Depending on how the "press" is conceptualized, regulation or taxation of advertising might not even raise a freedom of press issue. The point of freedom of the press might be to allow people who want to publish and people who want to receive press communications to do so—assuming the would-be publishers have sufficient resources (suggesting A.J. Liebling's remark: "Freedom of the press is guaranteed only to those who own one," A.J. LIEBLING, *THE PRESS* 32 (1975)), and assuming the would-be recipients can convince (pay) the press to provide them with the communications. Under this view, although press freedom would encompass the editors' freedom to publish any content they chose (including the messages now contained in advertisements), it would not include the commercial transaction between the publisher and the advertiser. Regulation of advertising could be seen as directed at advertisers, not at the press. It would, like income taxes and other economic regulations, only affect the press's ability to obtain economic resources. The press has no constitutional right to demand a regime favorable to its needs to publish. For example, even though cigarette advertising was the largest source of revenue for television and radio, the Congressional ban on advertising cigarettes over the electronic media, which eliminated this revenue, did not infringe press freedom. *See* *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd without opinion*, 405 U.S. 1000 (1972). Of course, even on this understanding of the press, if the *purpose* of the regulation or prohibition of advertising was to undermine the press as an institution, the law would be unconstitutional. The proposals advanced in Part IV, however, should be characterized as having the purpose of strengthening the press as an institution.

⁴⁴⁸ *See, e.g.,* *Bates v. State Bar*, 433 U.S. 350 (1977) (holding that lawyer advertisements of the costs of routine services were protected by the First Amendment); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that state's restrictions against commercial speech impermissibly infringed on First Amendment rights); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that printing advertisements of legal out-of-state abortions was protected by the First Amendment).

tion directly advances a substantial governmental interest.⁴⁴⁹ These recent cases hint that the Court's protection of commercial speech may be limited virtually to its original consumer-protection oriented decisions, such as those striking down bans on advertising drug prices or lawyer services. These restrictions on commercial speech harmed consumers while benefitting segments of the pharmacy or legal profession by limiting competition, usually price competition.⁴⁵⁰ Although commercial speech possibly should never have been protected at all,⁴⁵¹ under current doctrine any good policy justification for a tax or regulation should defeat an advertiser's First Amendment claims.

C. Application of Constitutional Principles

Part IV's policy proposals should withstand constitutional attack. Still, the clarity of this conclusion depends on the specific design of the proposals.

First are the various proposals to tax advertising. Such taxes are arguably like the stamp act taxes that, according to *Grosjean*, helped prompt adoption of the First Amendment.⁴⁵² The tax most

⁴⁴⁹ See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571-72 (1980) (adopting four-part test and indicating in dicta that the state could restrict the content of advertising in order to advance its conservation goals if the restriction only barred advertising content that interfered with this goal); see also *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (applying *Central Hudson* and upholding regulation of casino advertising directed at local population in order to reduce demand for gambling by local residents, even though the gambling and the casinos were legal in Puerto Rico); cf. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990) (upholding a ban on certain forms of corporate political speech and association that would be impermissible if applied to individuals); *Board of Trustees v. Fox*, 492 U.S. 469 (1989) (rejecting use of least restrictive alternative test in commercial speech cases and only requiring a reasonable fit between ends and means); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (majority of Court willing to allow a ban on commercial billboards).

⁴⁵⁰ See, e.g., *Bates*, 433 U.S. 350; *Virginia State Bd. of Pharmacy*, 428 U.S. 748; *Bigelow*, 421 U.S. 809; cf. STEVEN SHIFFRIN, *FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990) (arguing that the dissenter should be the central image of free speech); Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30 (1979) (characterizing *Virginia State Bd. of Pharmacy* as a resurrection of economic due process, "clothed in the ill-fitting garb of the first amendment"); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983) (arguing for a more nuanced approach to commercial speech that, given his emphasis on the dissenter being central to the First Amendment, is probably consistent with the regulation of advertisers proposed in this Article).

⁴⁵¹ See, e.g., BAKER, *supra* note 11, at 194-224.

⁴⁵² See *Grosjean v. American Press Co.*, 297 U.S. 233, 245-49 (1936). The Court's

vulnerable to challenge would be one that applies uniquely to, or at a higher rate to, advertising in only some segments of the media. The Court has never upheld such a tax⁴⁵³—but then, no such tax has been defended on a legitimate ground that could provide a rationale for the differential treatment.⁴⁵⁴ In contrast, Part IV's proposed taxes on advertising serve First Amendment values. Both the tax and the subsidy perfectly fit the important goal of making the press more responsive to its readers by reducing advertising's value and increasing circulation sales' value to the media, thereby

historical suggestion has surprisingly little support in most histories of the Press Clause. See *Murdock v. Pennsylvania (City of Jeannette)*, 319 U.S. 105, 125-26 (1943) (Reed, J., dissenting) (concluding that an examination of sources shows no support for the claim that the Stamp Act influenced the adoption of the First Amendment). Possibly because of a focus on seditious libel in their principal historical works, neither Levy nor Anderson describe a concern about the Stamp Act as playing any role in the adoption of the First Amendment. See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983). But cf. ZECHARIAH CHAFFEE, JR., *FREE SPEECH IN THE UNITED STATES* 17-18 n.33 (1941) (newspaper letters citing the danger of a Stamp Act, like the one in Massachusetts, as showing the need for constitutional protection in the proposed Bill of Rights); Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 209 (1984) (referring to two anti-federalists' concerns about the effects on a free press of Congress's power to tax, one of whom expressed fear that Congress might use "a cursed abominable Stamp Act" to "abolish the freedom of the press" and invoked this concern to argue for a Bill of Rights). Although England's imposition of a Stamp Act, which applied to both newspapers and newspaper advertising, may have stirred opposition which contributed significantly to the American Revolution, the colonists' opposition revolved primarily around the "no taxation without representation" issue. See, e.g., EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS* (1953). Still, Massachusetts' 1785 stamp tax on newspapers and its subsequent tax on newspaper advertisements, with which the state quickly replaced the initial stamp tax, generated strong opposition both in Massachusetts and in commentary from other states precisely on the ground that the tax was an "unconstitutional restraint on the Liberty of the Press." Carol S. Humphrey, *"That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788*, 14 JOURNALISM HIST. 34, 37 (1987) (quoting Isaiah Thomas from the ESSEX JOURNAL, Apr. 19, 1786, and the MASSACHUSETTS GAZETTE, Apr. 24, 1786). Repeal in 1786 of the Massachusetts advertising tax was treated as a great victory for "Freedom of the Press." *Id.* Certainly this history supports the notion that stamp taxes, including advertising taxes of the time, violated prevalent early conceptions of press freedom, thereby lending support to the general linkage suggested in *Grosjean*. This history does not speak, however, to the question of the validity of taxes that do not have an objectionable, unconstitutional purpose to undermine press freedom.

⁴⁵³ Although *Medlock v. Leathers* allowed the state to treat different media differently, the tax on cable services was identical to the tax on many other items and thus did not single out the media or any segment of it for a greater burden. See *supra* note 440.

⁴⁵⁴ The government entities in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project* all lacked plausible, legitimate rationales for their differential treatment of portions of the press.

leading any profit-oriented press to focus its decision making more on the needs and interests of its readers and less on the interests of its advertisers. Except for a law imposing a direct burden on an editor's decision to publish particular messages,⁴⁵⁵ the Court has never struck down a tax or regulation that was designed to improve press functioning by structural regulation,⁴⁵⁶ as opposed to laws that censor press content.⁴⁵⁷ This legitimate justification of the tax proposals should suffice here.

Even if the Court struck down a special media-oriented advertising tax, it would clearly uphold a more broad-based tax. The tax would probably be sufficiently general if it applied to all advertising (including direct mail, billboard, point of purchase display ads and promotions, free shoppers, and advertising supplements) and not just advertising in the media or in one portion of the media.⁴⁵⁸ There would also be significant policy advantages in adopting this broader tax. Taxing only advertising in newspapers, for example, would cause some advertisers to shift some of their expenditures on newspapers to other advertising mediums, resulting in a net reduction in newspapers' revenue. In contrast, a tax on all advertising expenditures would greatly reduce these shifts in advertisers' allocation of advertising expenditures.⁴⁵⁹ If all the tax revenue went to subsidize newspapers (or newspapers and other mass media), the broader advertising tax would probably increase net newspaper or media revenue. Thus, even though a narrow tax probably meets

⁴⁵⁵ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁴⁵⁶ See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814-15 (1978) (upholding cross-ownership rules); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943) (upholding the broadcast licensing system established by Congress against First Amendment challenge); *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 483 (9th Cir. 1983) (upholding the Newspaper Preservation Act), *cert. denied*, 464 U.S. 892 (1983). The regulation at issue in *Tornillo* is best seen as a burden imposed on particular editorial decisions, not as a structural regulation of the media.

⁴⁵⁷ See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating prohibition on election-day editorial endorsements).

⁴⁵⁸ In 1978, total advertising expenditures in this country were divided as follows: newspapers 28.9%; magazines 5.9%; business and farm publications 3.4%; television 20.4%; radio 6.9%; direct mail 13.6%; outdoor 1.1%; miscellaneous 19.8%. See 2 *WORLD PRESS ENCYCLOPEDIA*, *supra* note 18, at 986. The point is that advertising is not necessarily tied to the "press." Therefore, a tax only on advertising could be treated as a general economic regulation.

⁴⁵⁹ Although the broader tax would prevent the shift of advertising from newspapers to other mediums, there would still be some shift of resources away from advertising in general.

constitutional requirements, this broader tax makes the most policy sense.⁴⁶⁰

Finally, if courts read the Press Clause to rule out even a broad advertising tax, the tax proposals in Part IV could rely on the unquestioned constitutionality of, for example, a general sales tax that included advertising among the taxed sales. The tax revenue derived from advertising could still support the subsidy plan.

The subsidy portion of Part IV's TA-SR proposal (or the subsidy for public broadcasting) should create no constitutional problems. A subsidy based on circulation revenue creates no issue of content discrimination, with its latent danger of censorship, but even content-oriented government subsidies such as grants by national endowments for the arts and humanities are often acceptable. The one significant policy concern with and, conceivably, constitutional objection to the subsidies is that the subsidy could make the press too dependent on the government. The press might become timid out of fear of losing the subsidy or could be manipulated by promises or threats regarding the subsidy. This concern is real and troubling.⁴⁶¹ As long as subsidies or special press benefits are permitted, this danger cannot be entirely eliminated. Nevertheless, as far as I know, this reasoning has never been the basis of a Court

⁴⁶⁰ In addition to its policy merits, the broader tax might reduce predictable opposition to the tax plan from the press. Karl-Erik Gustafsson reports that in Sweden, where an advertising tax finances a subsidy program somewhat similar to the one proposed here, the initial proposal was to impose a 10% tax on all advertising in the press. In response to the Center Party's suggestion, this was reduced to 6% for newspaper advertising, while staying at 10% for the rest of the press. But newspapers, which continue to oppose the advertising tax, successfully demanded that the media advertising tax be extended to a general advertising tax "so that it would not be in an unfavorable position compared with other advertising media." GUSTAFSSON, *supra* note 313, at 115-17 (1980). A more recent study states that the tax rate is 10% on all advertising except for 3% for newspapers. See Goran Hedebo, *Communication Policy in Sweden: An Experiment in State Intervention*, in COMMUNICATION POLICY IN DEVELOPED COUNTRIES 137, 143 (Patricia Edgar & Syed A. Rahim eds., 1983).

⁴⁶¹ This danger is the origin of the oft-noted problem of bias resulting in reporters' need to become too cozy with their governmental sources. I.F. Stone is famous for the view that reporters should not become too cozy, should not drink cocktails, with those on whom they are reporting, especially with those in power. See, e.g., LEE & SOLOMON, *supra* note 139, at 103. It explains, for example, why a local television station will sometimes choose not to broadcast graphic pictures of police brutality. Retired television anchor Roger Grimsby explained, "A reporter has to remain in the good graces of the police." In reward for killing the brutality pictures, the police gave the station a tip that then enabled the station to give the public award winning pictures of the police acting effectively. Lew Irwin, *Cops and Cameras: Why TV Is Slow to Cover Police Brutality*, COLUM. JOURNALISM REV., Sept.-Oct. 1991, at 15, 16-17.

decision striking down a subsidy scheme. The government has always provided extensive press subsidies. Some of these benefits, especially discretionary access to official sources and government advertising, have even been consistently used to manipulate the press. A subsidy based on circulation revenue allows for little administrative discretion. In this respect, it is most like the forms of subsidy that have been least susceptible to manipulative abuse. Unless all versions of subsidy are ruled unconstitutional, which is virtually unthinkable, the subsidy scheme proposed here should withstand constitutional challenge.

The regulatory proposals suggested in Part IV are also constitutional. These regulatory proposals amount to prohibiting the use of economic leverage to affect media content, at least unless the affected content is identified as an advertisement. A restriction on advertisers' influence on non-advertising content was first imposed in a limited fashion with the 1912 postal legislation, which denied special mailing privileges to papers that published advertising not clearly marked as an advertisement.⁴⁶² Like this early law, the proposals in Part IV do not prevent but indeed support editorial control over the publication's editorial content. Rather than interfering with or punishing an editor for editorial choices as in *Miami Herald Publishing Co. v. Tornillo*,⁴⁶³ restrictions on advertiser influence are versions of laws that prevent non-governmental combinations from using their power or their wealth to impose restraints on press freedom—the type of regulation the Court upheld in *Associated Press v. United States*.⁴⁶⁴

Analogous to the antitrust laws, laws to restrict the influence of advertisers on suppliers of media content merely prevent agreements (or the use of the economic leverage based on the potential for these agreements) in restraint of publication—that is, the proposals prohibit the advertiser from restraining the media enterprise's decisions to print or broadcast other than what it would independently choose. On the facts, the anti-trust analogy and the proposals made here are even closer. In *Associated Press*, the anti-trust laws were interpreted to prohibit the media from entering into agreements that would restrict their own and other media entities'

⁴⁶² See *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913) (upholding law against First Amendment challenge).

⁴⁶³ 418 U.S. 241 (1974).

⁴⁶⁴ 326 U.S. 1, 22-23 (1945); see also *National Broadcasting Co. v. United States*, 319 U.S. 190, 224-27 (1943) (upholding the FCC's chain broadcasting rules).

speech. If freedom of the press is seen as essentially the freedom of media to decide what to provide its audience, the advertiser influence that causes the media not to speak as it would otherwise choose is, using the words of Justice Black, a "nongovernmental combination" that "impede[s] the free flow of ideas," a "repression of that freedom by private interests."⁴⁶⁵

Tornillo is the central decision offering even potential support for a constitutional challenge to proposals limiting broadcast time devoted to advertising, requiring identification of advertisers, or requiring partial randomization of ad placement or block broadcasting of ads. The Court gave two grounds for its holding in *Tornillo*. The most persuasive, and narrower, basis of the holding was the Court's argument that requiring newspapers to print a response to the paper's own speech "exact[s] a penalty on the basis of the content of a newspaper."⁴⁶⁶ Not only is this penalty itself unconstitutional, it has the objectionable consequence that "editors might well conclude that the safe course is to avoid controversy. Therefore, . . . coverage would be blunted or reduced."⁴⁶⁷ This ground of decision creates no obstacle for any of the reforms offered here. It also makes unnecessary the decision's alternative, broader basis—the impermissibility of the statute's "intrusion into the function of editors."⁴⁶⁸

Even this broader basis of decision does not require invalidation of the policy proposals. First, editors' control over editorial choices does not necessarily mean they have the same authority over advertising. The function of the editor preeminently covers the medium's own speech. It is a separate question how much control the editor should have over space or time the editor (or publisher) opens up to sell to others for their speech. Second, the compelled speech implicit in identification requirements, possibly because of its factual nature, has generally been thought to raise less of a constitutional problem than compelled statement of opinion or

⁴⁶⁵ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁴⁶⁶ *Tornillo*, 418 U.S. at 256.

⁴⁶⁷ *Id.* at 257.

⁴⁶⁸ *Id.* at 258.

ideological viewpoint that was involved in *Tornillo*.⁴⁶⁹ Moreover, the identification requirement is clearly constitutionally acceptable as applied to advertiser-influenced content. No recent developments in commercial speech doctrine question the propriety of the Court's suggestion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* that: "[I]t . . . [may be] appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."⁴⁷⁰

Following European practice, the proposal to regulate the amount of broadcast advertising and to limit it to set blocks between programs, or the proposal to mandate randomized placement of broadcast advertising, are probably justifiable on grounds described above. However, their application in the broadcast context makes them even less vulnerable to attack given the Court's willingness to treat broadcasting as more subject to regulatory control than the print media.⁴⁷¹ The Court has hinted that it would allow mandatory acceptance of issue-oriented advertising if required by Congress (or the FCC)⁴⁷² and has upheld mandatory access for candidate campaign ads.⁴⁷³ These interferences are at least as intrusive into broadcaster's "editorial" freedom as the proposals made here. Likewise, earlier FCC restrictions on over-commercialization and current Congressional

⁴⁶⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding identification requirement). The lack of a serious constitutional problem with compelled factual statements may relate to the tantalizing statement of Justice Brennan, joined by Justice Rehnquist, that the decision in *Tornillo* "addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes [that] . . . require publication." *Tornillo*, 418 U.S. at 258.

⁴⁷⁰ 425 U.S. 748, 771-72 n.24 (1976).

⁴⁷¹ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969) (upholding fairness doctrine), cited as authority in *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990); cf. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) (eliminating fairness doctrine on statutory grounds), cert. denied, 493 U.S. 1019 (1990).

⁴⁷² See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 131 (1973).

⁴⁷³ See *Columbia Broadcasting Sys. v. FCC*, 453 U.S. 367, 397 (1980).

limitations on advertising time during children's programming⁴⁷⁴ provide support for the proposal to limit the amount of broadcast time devoted to advertising. The purpose of reducing advertiser influence over programming provides sufficient justification for these regulations.

CONCLUSION

The heart of the Article is Part I & II's examination of the way advertising undermines the free and democratic nature of the press, and Part IV's recommended legislative responses. Parts III & V were defensive. Part III explained that although economic theory supports or at least is consistent with the critique of advertising's effects on the media, economic theory does not help solve the normative issues raised concerning the proper structure of the media. Part V argued that, despite inevitable assertions to the contrary, the policy proposals do not conflict with the Constitution. This suffices as a recap. Here I will offer a few related observations.

First, the Article's portrayal of the serious and pervasive damage to a free and democratic press resulting from private power, from advertising, makes an implicit critical claim about current legal instruction and legal scholarship. Mass media courses and scholarship virtually ignore this problem, preferring to focus on the government as the potential problem (for example, the materials examining various forms of governmental censorship, governments' refusal to give the press access to information or facilities it controls, or its use of the press to carry out its own objectives) or the press as the potential problem (for example, materials examining injuries to reputational, privacy, or dignitary interests of private parties). These are important issues. But if legal scholarship is to serve democratic society, it should place a much greater emphasis on private power as a threat to press freedom.

Second, the scarcity of scholarly legal discussion of the specific issue of this Article, the pernicious influence of advertising on media content, or of the more general issue, private threats to a free press, is curious and deserves comment.⁴⁷⁵ Partly, the

⁴⁷⁴ See 47 U.S.C.A. § 303a(b) (West 1991); see generally *supra* note 373.

⁴⁷⁵ In addition to the impact of advertising, ownership concentration and ownership forms should receive closer review. The rich discussion of private speakers' access to the media as a forum for their speech is the major exception to the criticisms raised here.

scarcity may reflect academic fads—but what is the cause of the fad? Maybe it reflects the tendency to focus on likely subjects of litigation, particularly given the judicial focus of so much law teaching and scholarship. Or maybe it is the “sexiness” of constitutional issues. Nevertheless, the conventional focus of media law scholarship could reflect two more general problems: the generally inadequate attention given to structural issues, except structural problems that interfere with corporate interests (potential clients); and the comparative lack of development within the legal academy, particularly among media scholars, of the particular intellectual tools needed to understand these issues.⁴⁷⁶ Within the mass media field itself, book after book, speech after speech, by retiring, high level journalists, editors, and producers criticize the media for failings linked to compromises with commercialization and the pressures for profits. For the most part, however, these commentaries then go on to recommend individualistic solutions—higher professional standards, heroics in standing up to these commercial pressures (imitating the best journalists of an often idealized past), and, sometimes, more ethics in journalism education. This advice cannot be faulted. But the stories of commercial censorship, stories that go back over a hundred years, seldom portray media people as particularly weak or misguided. Rather the problems identified are structural. Surely this calls for structural responses.

Ironically, the shadow of the First Amendment may encourage narrowness in media scholarship and policy-oriented media inquiries. For one whose scholarly focus has been in trying to deepen understanding of the First Amendment and to broaden and strengthen its reach, this comment is troubling. Still, I wonder if the paucity of policy-oriented thinking about the press, thinking that even outside legal circles seems less developed in this country than elsewhere, may reflect a tendency of Americans to assume that any government action focused on the press is probably unconstitutional—and, therefore, worth thinking about only in terms of how it can be avoided or criticized. Of course, this legalistic response seldom blocks inquiry when demanded by a powerful, influential constituency. But in the context of remedying corrosive effects of private

⁴⁷⁶ This point is very impressionistic and should not be overstated. Interdisciplinary work certainly occurs in law, especially with the pervasive use of law and economics, although the economics is often used merely to recommend market responses or to cure overt market failures.

power on press freedom, legislative responses are likely to be costly to many elements of the most influential interest groups—the corporate-owned press and the advertising industry. Even if academic media critics show that lack of structural reform seriously damages both political and cultural democracy, the public is unlikely to feel the injury acutely or to associate the injury with inadequacies of the structure of the press. Organized public pressure for change will not easily develop.⁴⁷⁷

Finally, the American press properly receives widespread respect from around the world. As I await the *New York Times* each night at the newsstand, I, and I suspect most of us, have an almost reflexive instinct: “We’ve got it pretty good in respect to the press in this country; if it ain’t broken, don’t fix it.” This view, however, should not be accepted uncritically. In our understanding of the events of the day, we are largely the products of our press. It is awfully easy to adopt the Whiggish view “that it is not broken” precisely because “it” is largely “us.”⁴⁷⁸ Moreover, in historical terms, our press has impressively served freedom and enlightenment. But these merits do not mean it does not have serious flaws. Surely, we must also be concerned about such things as the low levels of political participation and political knowledge that exist in this country. Is Watergate a victory of an adversarial press or a rare case of one paper stumbling onto the story? Why do stories of government and corporate failures and corruption fail to generate constituencies for needed fundamental change? For every initiative for which we praise the press, we have no easy way of knowing the initiatives they failed to undertake,⁴⁷⁹ or the media campaigns that do not occur. Nor can we know, at least without study, the causes of the press not undertaking initiatives. More reflective inquiry is needed. This Article stands as an assertion that, if one engages in that inquiry, the conclusion will be that the press is “broken,” or at least in need

⁴⁷⁷ Although I maintain hope that it is not crucial, media reform seems much more likely in politics with strong political parties that can play a leadership role in change.

⁴⁷⁸ As law schools and legal scholarship open up to people with more diverse backgrounds and perspectives, this point might be muted. Still, the mass media is much too pervasive for even greater diversity to eliminate the problem of over-complacency with the basic structure of the media that we now have.

⁴⁷⁹ An interesting enterprise has been an annual attempt to publicize the major stories missed during the year. See Project Censored, *The Top 10 Censored Stories of 1990*, 46 UTNE READER 61 (1991). Since there are published references for each story, “missed” apparently refers to coverage being insignificant in the national news media despite the story’s obvious importance.

of a major tune-up; that our press does not serve a democratic society as much as it should and could; and that structural reform is necessary if it is to do so.

